

6

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911-1912

No. ~~499~~ 307

P. A. CARLSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON ON THE RELATION OF
CHARLES P. CURTISS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED JULY 20, 1912.

(23,303)

(23,303)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 728.

P. A. CARLSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON ON THE RELATION OF
CHARLES P. CURTISS

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1-2 STATE EX REL CHARLES P. CURTISS, Respondent,
v.
C. J. ERICKSON and T. A. CARLSON, Appellants.

Error to the Supreme Court of the United States from the Supreme
Court of the State of Washington.

[Said of the Supreme Court, State of Washington.]

3 In the Superior Court of the State of Washington in and for
Thurston County.

No. 9761

No. 4503

STATE EX REL CHAS. P. CURTISS, Plaintiff,

vs.

C. J. ERICKSON and T. A. CARLSON, Defendant.

Index Filed Aug. 28, 1911. C. S. Rounhart, Clerk. F

4 In the Superior Court of the State of Washington in and for
Thurston County.

No. 4503.

STATE EX REL CHAS. P. CURTISS, Plaintiff

vs.

C. J. ERICKSON and T. A. CARLSON, Defendants.

Affidavit of Chas. P. Curtiss.

STATE OF WASHINGTON.

County of King, ss.

Chas. P. Curtiss being first duly sworn on oath deposes and says that he is a citizen of the state of Washington. That on the 22nd day of October, 1910, in an action pending in the above entitled court, wherein Wm. L. Bilger et al. are plaintiffs, and the State of Washington, King County and C. J. Erickson are defendants, this court rendered a decision, after a full hearing directing that a decree issue in accordance with the prayer of the complaint, and ordered an injunction to be issued against the defendants, their servants, agents, officers and employees doing any acts complained of, and particularly against the defendants further excavating the channel, or canal, between Lakes Washington and Union, or lowering the waters of Lake Washington. That the said C. J. Erickson was a party defendant to this action and had notice of said decree. That the said

P. A. Carlson was, and is, in the employ of the said C. J. Erickson, as foreman and had notice of said decree. That a notice a copy of which is attached hereto and by reference made a part hereof was served upon the said P. A. Carlson at five minutes after eleven o'clock on the 24th day of October, 1910, and that the said C. J. Erickson and P. A. Carlson did, wilfully and continuously, refuse to obey said decree in this, to-wit:

That on the 26th day of October, 1910, at 4:50 o'clock p. m., defendants C. J. Erickson and P. A. Carlson, in defiance of said decree and for the purpose and with the intent of depriving plaintiff of the benefits resulting from the relief granted, did, by means of dynamite or other explosive, blow out the embankment which, until that time, held the waters of Lake Washington at their natural level. That said act of the defendants was intended to cause, and did cause the waters of Lake Washington to flow through the channel of the so-called Lake Washington canal, and ~~was~~ cause, and is causing, a restriction of the flow of said Lake Washington, and will interfere, damage and deprive the plaintiff of the full measure of relief granted, and intended to be granted by this court. That said acts were in violation of the terms of the decree pronounced by the court. That this application is made for the purpose of obtaining an order to show cause why said P. J. Erickson and P. A. Carlson should not be punished as for criminal contempt.

CHARLES P. CURTIS

Subscribed and sworn to before me this 2nd day of November 1910.

EDGAR J. WRIGHT,

*Notary Public in and for the State of
Washington, Residing at Seattle.*

In the Superior Court of the State of Washington in and for the County of Thurston.

No. 4204.

WILLIAM L. BILGER et al., Plaintiffs,

vs.

THE STATE OF WASHINGTON, KING COUNTY, and C. J. ERICKSON,
Defendants.

To C. J. Erickson, defendant:

You are hereby notified that said court in the above entitled action, on October 22nd, 1910, rendered a decision on the merits in favor of the plaintiffs, granting them relief in full as prayed for in their complaint, and ordered an injunction to be issued against the defendants doing any acts complained of, and particularly against the defendants further excavating the channel or canal between Lakes Washington and Union and lowering the waters of Lake

Washington, that the final decree making said injunction permanent is about to be entered and you are hereby notified not to remove the barrier of earth between the waters of Lake Washington and the channel which you have excavated under the contract in controversy in this action, and not to do any act which will lower or tend to lower the waters of Lake Washington, and that if you do any such act, it will be contempt of court and you will do it at your peril.

Seattle, Washington, October 30th, 1910.

THOMAS A. MEADE,

Attorney for Plaintiffs

Filed Nov. 3rd, 1910

W. M. NUNN, *Clerk*

By EDITH HOPP, *Dep.*

In the Supreme Court of the State of Washington to and for
Thompson County

No. 4503

Stacy ex Rel. Chas. F. Curtiss, Plaintiff,

vs.

C. J. Erickson and P. A. Carlson, Defendants

Order

On reading and filing the affidavit of Chas. F. Curtiss, it is

Ordered, that the above named defendants C. J. Erickson and P. A. Carlson, show cause before this court at the court house in the city of Olympia in said county, on the 21st day of Nov., 1910, at the hour of 1:30 o'clock p. m., or as soon thereafter as counsel can be heard, why they should not be punished as for contempt, for their misconduct in wilfully and continuously refusing to obey the order of said court as set forth in said affidavit.

Let this order and a true copy of said affidavit be served on said C. J. Erickson and P. A. Carlson at least 10 days before the time herein fixed for hearing by the court.

Done in open court this 3rd day of Nov. 1910

JOHN R. MITCHELL, *Judge*

Filed Nov. 3rd, 1910

W. M. NUNN, *Clerk*

By EDITH HOPP, *Dep.*

8 In the Superior Court of Thurston County, State of
Washington.

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,

VS.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Demurrer.

Come now the defendants by their attorneys, Shank & Smith and demur to the affidavit and order herein forming the basis of this proceeding, upon the following grounds:

I.

That the court has no jurisdiction of the person of the defendants or of the subject matter of the action.

II.

That there is a defect of parties plaintiff.

III.

That the affidavit does not state facts sufficient to constitute a cause of action against the defendants for contempt or otherwise.

IV.

That the act complained of, if committed at all, was committed within the canal zone and upon property under the sole and exclusive charge and jurisdiction of the United States government.

SHANK & SMITH,

Attorneys for Defendants.

STATE OF WASHINGTON.

County of King, ss:

9 Corwin S. Shank, being first duly sworn on oath deposes and
says: that he is one of the attorneys of record for the defendants in the foregoing action; that he has read the above and foregoing demurrer and knows the contents thereof and believes the same to be meritorious and well founded in law.

CORWIN S. SHANK.

Subscribed and sworn to before me this 22nd day of November, 1910.

H. C. BETT,

*Notary Public in and for the State of
Washington, Residing at Seattle.*

Filed Dec. 14, 1910.

W. M. NUNN, Clerk.

10 In the Superior Court of the State of Washington in and for
Thurston County.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,

vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Order on Demur.

Now on this 14th day of November, 1910, this cause coming on to be heard upon the demur of the defendants to the affidavit and proceedings herein, plaintiff appearing by *their* attorney Thomas A. Meade and P. C. Sullivan counsel, and defendants appearing by their attorneys Shank and Smith, the court after argument hereby orders that the demur be and the same is hereby overruled to which order the defendants except and exception is allowed by the court.

JOHN R. MITCHELL, *Judge*.

Filed Dec. 19, 1910.

W. M. NUNN, *Clerk*.

11 In the Superior Court of Thurston County, Washington.

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,

vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Affidavit of P. A. Carlson in Answer to Order to Show Cause.

STATE OF WASHINGTON,

County of King, ss:

P. A. Carlson, being first duly sworn on oath deposes and says:

I am one of the defendants herein. I deny that on October 26, 1910, this Honorable court, or any other court, had made and entered a judgment and decree in the action referred to in the affidavit of Charles P. Curtiss, plaintiff herein or in any other action. I further deny that I blew out the embankment referred to at the orders of C. J. Erickson, but on the contrary did so by express orders of the engineering department of the United States government. I deny that the removal of said embankment lowered the waters of Lake Washington or reduced the level of said lake, or in any wise damaged the relator herein, or any of the plaintiffs in said action mentioned. I deny that I have done anything in violation of the terms of any decree made by this court.

P. A. CARLSON.

Subscribed and sworn to before me this 15th day of November, 1910.

CORWIN S. SHANK,

*Notary Public in and for the State of
Washington, Residing at Seattle.*

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Filed Dec. 29, 1910.

W. M. NUNN,

12 In the Superior Court of Thurston County, Washington.

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,

vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Affidavit of C. J. Erickson in Answer to Order to Show Cause.

STATE OF WASHINGTON,

County of King, ss:

C. J. Erickson, being first duly sworn on oath deposes and says:

I am one of the defendants herein. I deny that on October 26, 1910, this Honorable court, or any other court, had made and entered a judgement and decree in the action referred to in the affidavit of Charles P. Curtiss, plaintiff herein or in any other action. I further deny that I have at any time refused to obey the judgments and decrees of this court, or have acted contumaciously thereto. I further deny that I had anything to do whatsoever with the final blowing out and opening of the canal between Lakes Washington and Union, but that the final opening thereof was done contrary to my express orders. I deny that the opening of the canal caused any reduction in the level of the waters of Lake Washington. I deny that I have done anything in violation of the terms of any decree made by this court.

C. J. ERICKSON

Subscribed and sworn to before me this 15th day of November, 1910.

CORWIN S. SHANK,

*Notary Public in and for the State of
Washington, Residing at Seattle*

Filed Dec. 29, 1910.

W. M. NUNN, Clerk.

13 In the Superior Court of the State of Washington in and for the County of Thurston.

No. 4503.

STATE ex Rel, CHAS. P. CURTISS, Plaintiff,

vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Judgment and Sentence.

This cause coming on to be heard on the 28th day of December 1910, defendants appearing by their attorneys Shank & Smith, and the plaintiff appearing by attorneys Thomas A. Meade and P. C. Sullivan and the defendants having filed written answer denying that they were guilty of contempt of court as charged, the cause was tried upon its merits, and the court after hearing the arguments, finds that on the 22nd day of October, 1910, in an action pending in the above entitled court wherein Wm. L. Bilger et al, were plaintiffs and the state of Washington King County and C. J. Erickson were defendants, this court rendered a decision, after a full hearing, directing that a decree issue in accordance with the prayer of the complaint, and ordered an injunction to issue against the defendants, their servants, agents, officers and employees doing any of the acts complained of in said complaint, and particularly against the defendants in that action from further excavating the channel, or canal, between Lake Washington and Lake Union, or lowering the waters of Lake Washington. That at the time the aforesaid decree was announced and rendered in open court on said 22nd day of October, 1910, the defendants were present in court, by their counsel and attorneys or some of them. That hereafter on the 28th day of October, 1910, a formal written decree was entered in accordance with the announcement already made, a copy of which decree is as follows:

14 In the Superior Court of the State of Washington in and for Thurston County,

No. 4204.

WILLIAM L. BILGER and SALLIE M. BILGER, His Wife; CHARLES P. CURTISS and Pearl H. Curtiss, His Wife; Harry H. Hurlbut and Pauline Hurlbut, His Wife; Frank J. Victor and Lilian Victor, His Wife; Jacob R. Nachant and Frances M. Nachant, His Wife, Plaintiffs,

vs.

THE STATE OF WASHINGTON, KING COUNTY, and C. J. ERICKSON, Defendants.

Decree.

This cause having been heretofore submitted to the court for decision upon the pleadings, proofs and entire records, and the court

having heard the arguments of counsel, for plaintiffs as well as the defendants, and having at the conclusion of such argument on the 22nd day of October, 1910, in open court announced his findings and decision that the plaintiffs were entitled to the relief as prayed for in their complaint, and directed the preparation and presentation of decree to that effect.

Now, upon motion of plaintiffs, it is ordered, adjudged and decreed that the plaintiffs and each of them are the owners of the several tracts of lands and shore lands described in the complaint herein, and all riparian and other rights pertaining to shore lands and to lands abutting upon navigable waters. That the proceedings heretofore taken by the defendants herein as set forth in the pleadings in this cause for the excavation of what is known as the Lake Washington canal, and the lowering of the waters of the said Lake Washington, impair the value of said plaintiffs' property and if consummated will cause great and irreparable damage thereto and

are a violation of the constitution of the United States and of
15 the State of Washington. That none of the defendants have any right to lower the waters of said Lake Washington, nor to take or damage any of the property rights of the plaintiffs described in the complaint herein. That the plaintiffs are entitled to and are hereby respectively confirmed in the use and enjoyment of their rights of access and navigation and other riparian rights pertaining to their several tracts of land abutting upon said Lake Washington, and as shore land owners thereon. That the assessment threatened to be levied by King County, as shown in the pleadings herein and the threatened issue of warrants thereunder are and each of them — illegal and void and in violation of said constitutional provisions, and constitutes illegal and inequitable clouds upon the titles of the plaintiffs to said respective tracts of land and shore lands described in said complaint. That the defendants herein, the state of Washington, King County and C. J. Erickson, and each of them, their servants, officers, agents, employees and representatives, be and they are hereby restrained and perpetually enjoined from taking further proceedings to the effect and intent of excavating said Lake Washington, canal, or any part thereof, or of lowering the waters of said Lake Washington, or of levying said assessment or of issuing any warrants thereunder, or creating any indebtedness of said state or of said county, for the purpose or with the intent of excavating said canal, or for the purpose or to the end and effect of lowering the waters of said Lake Washington. And that the plaintiffs recover from the defendants above named their costs and reasonable disbursements herein.

And it having this day been brought to the attention of the court that since the announcement of the decision of this court in this cause, and on or about four o'clock p. m. of October 26th,
16 1910, some person or persons by the use of dynamite or other explosive, tore the bottom of the ditch or excavation so as to lower the bottom thereof below the surface of the waters of said Lake Washington, and thereby turned the waters of said lake into the ditch or canal, and that such condition, if continued, will prob-

ably result in inflicting damage upon the plaintiffs sought to be prevented by the decree in this cause, and it having been suggested to the court that such act was committed by some of the defendants other than State of Washington and county of King their servants, agents, employees or representatives,

Now therefore it is further ordered, and adjudged by the court that jurisdiction of this cause be, and the same is, retained to the extent and purpose of enabling the court after further investigation and hearing, to make such further supplemental order or decree herein touching said alleged acts committed subsequent to the announcement of the decision of this court of October 22nd, 1910, as the court on such hearing may find to be just, equitable and proper in the premises.

Ordered, adjudged and decreed in open court this 28th day of October, 1910.

JOHN R. MITCHELL, *Judge.*

Filed October 28th, 1910.

17 That said defendant Erickson was a party to said action and had knowledge of the decree of the court from the time it was rendered on the 22nd day of October, 1910. That thereafter on the 26th day of October, 1910, he was actually served with a written notice of the announced decree of the court, which notice was served upon him by attorney for the plaintiff, in which notice he was informed that the court had rendered a decision on the merits in favor of the plaintiffs, granting them relief in full as prayed for in their complaint and that an injunction be issued against the defendants doing any of the acts complained of and particularly against the defendants further excavating the channel or canal, between Lake Washington and Lake Union and lowering the waters of Lake Washington, and that the final decree was about to be entered in accordance therewith, and which notice further notified said Erickson not to remove the barrier of earth between the waters of Lake Washington and the channel, and not to do any act which would lower, or tend to lower, the waters of Lake Washington, and that if he did any such act he would be guilty of contempt of court, which written notice was signed by Thomas A. Meade, attorney for the plaintiff, which notice the defendant Erickson had heard read, or had full knowledge of before the doing of the acts complained of in these contempt proceedings. Further that defendant Erickson had actual knowledge of the decision of the court from the reading of the newspapers prior to the 26th day of October, 1910. That the defendant Carlson had read said notice above mentioned and had actual notice of the decision therein prior to the time he did, or assisted in doing, the acts complained of herein. That Carlson was on said 22nd day of October, 1910, and continued to be up to and including the 26th day of October, 1910, an employee and servant of the said defendant Erickson. That notwithstanding the announcement of the decision of this court on the 22nd day of October,

1910, the defendants herein continued to, and did, and did,
18 excavate and remove the soil and earth immediately about
and next to the shores of Lake Washington for the purpose
of making a canal through which the waters of Lake Washington
could flow out of said lake. That on said 26th day of October,
1910, in the afternoon thereof, the defendants, after having notice
and knowledge of the decree and order as aforesaid did by means
of dynamite, or other explosive, blow out the embankment which
until that time held the waters of Lake Washington at their natural
level; the result of which was to permit the waters of Lake Washing-
ton to flow into the canal, or channel, excavated by the defendants,
and which act tended to lower the level of said Lake Washington,
That all of the said acts of the defendants were done intentionally
and deliberately and without excuse, which said acts were in viola-
tion of the terms of the decree announced by the court on the 22nd
day of October, 1910, and in defiance thereof. That the court fur-
ther finds that the actions of the defendants tended to defeat and
prejudice the rights and remedies of the plaintiffs in the said action
of Win. L. Bilger et al. vs. the State of Washington, King County
and C. J. Erickson and did prejudice the plaintiffs in said action
and the rights and remedies of the plaintiffs therein.

It is therefore ordered, adjudged and considered by the court that
the said defendants C. J. Erickson and P. A. Carlson are guilty of
contempt of court and they are hereby adjudged guilty of contempt
of this court.

It is further ordered and adjudged that said defendant C. J.
Erickson be and he is hereby sentenced and fined in the sum of
three hundred (\$300) dollars, and further that he be confined in
the county jail of Thurston county for a period of sixty
19 (60) days, and that the defendant P. A. Carlson be, and he
is hereby sentenced and fined to pay the sum of one hun-
dred (\$100) dollars and the costs of these contempt proceedings.

It is further ordered and adjudged that the defendant Erickson
stand committed to the county jail of Thurston county, Washing-
ton for a period of sixty (60) days and for a further period suf-
ficient to pay said fine of three hundred (\$300) dollars, if the same
is not paid, and that the defendant P. A. Carlson also stand com-
mitted to the county jail of Thurston county until said fine of one
hundred (\$100) dollars and the costs, 19.00 of these contempt pro-
ceedings are paid.

Done in open court this 24th day of January, 1911.

JOHN R. MITCHELL, *Judge.*

Filed Jan. 24, 1911.

D. G. PARKER, *Clerk.*

20 In the Superior Court of the State of Washington in and
for the County of Thurston

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,

vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Order Fixing Bail on Appeal.

Now on this 24th day of January, 1911, this cause coming on to be heard upon the application of Shank & Smith, attorneys for the defendants herein, to be admitted to bail pending an appeal from the final judgment of the court in this cause, and said Shank & Smith asking *asking* the court to admit said defendants to bail in a joint bond of one thousand five hundred (\$1,500) dollars.

Now therefore upon the request of said attorneys Shank & Smith, the bond of said defendants upon appeal is hereby fixed in the sum of one thousand five hundred (\$1,500) dollars, and it is

Ordered that they be admitted to bail pending the appeal upon giving bond in this amount and that all proceedings against them be stayed in that event pending the appeal.

Done in open court this 24th day of January, 1911.

JOHN R. MITCHELL, Judge.

Filed Jan. 24, 1911.

PHIL. SKILLMAN, Dep. Clerk.

21 In the Superior Court of the State of Washington in and for
the County of Thurston.

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,

vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Bond.

Know all men by these presents, that we, C. J. Erickson and P. A. Carlson, as principals, and W. G. Jones as surety, are jointly and severally firmly bound unto the above named plaintiff in the sum of two thousand (\$2000) dollars for the payment of which well and truly to be made we hereby bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these presents.

Dated this 23rd day of January, 1911.

The conditions of the foregoing obligation is such that whereas the above named principal obligors are appealing from the final judgment entered in the above entitled court and cause.

Now therefore if the said principal obligors will pay all costs and damages that may be awarded against them, or either of them, on the appeal or on the dismissal thereof, not exceeding two hundred dollars (\$200) and will satisfy and perform the said judgment appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, then this obligation shall be void, otherwise to remain in full force and effect.

C. J. ERICKSON,
By SHANK & SMITH,
His Attorneys.
P. A. CARLSON,
By SHANK & SMITH,
His Attorneys.
W. G. JONES.

22 STATE OF WASHINGTON,
County of King, ss:

W. G. Jones, being first duly sworn upon oath deposes and says: That he is the person who signed the foregoing bond as surety, and that he is a resident of the state of Washington and is not a counselor, attorney at law, sheriff, clerk of the superior court or any officer of any court, and that he is worth the sum of four thousand dollars (\$4000) over and above all just debts and liabilities in property within this state, exclusive of property exempt from execution.

W. G. JONES.

Subscribed and sworn to before me this 23rd day of January, 1911.

[SEAL.]

H. C. BETT,
*Notary Public in and for the State of
Washington, Residing at Seattle.*

Filed Jan. 24, 1911.

PHIL SKILLMAN,
Deputy Clerk.

23 In the Superior Court of the State of Washington in and for
Thurston County.

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,

VS.

C. J. ERICKSON and P. A. CARLSON, Defendants

Exceptions of Defendants.

Come now the defendants herein and except to the findings of the court herein as follows:

I.

These defendants except to the finding of the court wherein the court finds "that on the 22nd day of October, 1910, in an action

pending in the above entitled court wherein Wm. L. Bilger et al. were plaintiffs and the State of Washington, King County, and C. J. Erickson were defendants, this court rendered a decision, after a full hearing, directing that a decree issue in accordance with the prayer of the complaint, and ordered an injunction to issue against the defendants, their servants, agents, officers and employees doing any of the acts complained of in said complaint, and particularly against the defendants in that action from further excavating the channel or canal between Lake Washington and Lake Union, or lowering the waters of Lake Washington," and from each and every part thereof.

II.

These defendants except to the findings of the court wherein the court finds "That at the time the aforesaid decree was announced and rendered in open court on said 22nd day of October, 1910, the defendants were present in court, by their counsel and attorneys, or some of them," and from each and every part thereof

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III.

These defendants except to the finding of the court wherein the court finds "That thereafter on the 28th day of October, 1910, a formal written decree was entered in accordance with the announcement already made, a copy of which decree is as follows: (here follows a copy of said decree)," and from each and every part thereof.

IV.

These defendants except to the finding of the court wherein the court finds, "That said defendant Erickson was a party to said action and had knowledge of the decree of the court from the time it was rendered on the 22nd day of October, 1910," and from each and every part thereof.

V.

These defendants except to the findings of the court wherein the court finds "That thereafter on the 26th day of October, 1910, he was actually served with a written notice of the announced decree of the court which notice was served upon him by attorney for the plaintiff, in which notice he was informed that the court had rendered a decision on the merits in favor of the plaintiffs, granting to them relief in full as prayed for in their complaint and that an injunction be issued against the defendants doing any of the acts complained of and particularly against the defendants further excavating the channel, or canal, between Lake Washington and Lake Union and lowering the waters of Lake Washington, and that the final decree was about to be entered in accordance therewith, and which notice further notified said Erickson not to remove the barrier of earth between the waters of Lake Washington and the channel, and not to do any act which would lower, or tend to lower, the waters of Lake Washington and that if he did any such act, he would

be guilty of contempt of court, which written notice was signed by Thomas A. Meade, attorney for the plaintiff, which notice the defendant Erickson had heard read, or had full knowledge of before the doing of the acts complained of in these contempt proceedings," and from each and every part thereof.

25

VI.

These defendants except to the findings of the court wherein the court finds, "further that defendant Erickson had actual knowledge of the decision of the court from the reading of the newspapers prior to the 26th day of October, 1910" and from each and every part thereof.

VII.

These defendants except to the finding of the court wherein the court finds, "That the defendant Carlson had read said notice above mentioned and had actual notice of the decision therein prior to the time he did, or assisted in doing, the acts complained of herein," and from each and every part thereof.

VIII.

These defendants except to the finding of the court wherein the court finds, "That Carlson was on said 22nd day of October, 1910, and continued to be up to and including the 26th day of October, 1910, an employee and servant of the said defendant Erickson," and from each and every part thereof.

IX.

These defendants except to the finding of the court wherein the court finds, "That notwithstanding the announcement of the decision of this court on the 22nd day of October, 1910, the defendants herein continued to, and did, excavate and remove the soil and earth immediately about and next to the shores of Lake Washington for the purpose of making a canal through which the waters of Lake Washington could flow out of said lake," and from each and every part thereof.

X.

These defendants except to the finding of the court wherein the court finds, "That on said 26th day of October, 1910 in the
26 afternoon thereof, the defendants, after having notice and knowledge of the decree and order as aforesaid, did by means of dynamite, or other explosive, blow out the embankment which until that time held the waters of Lake Washington at their natural level; the result of which was to permit the waters of Lake Washington to flow into the canal, or channel, excavated by the defendants, and which act tended to lower the level of said Lake Washington," and each and every part thereof.

XI.

These defendants except to the finding of the court wherein the court finds, "That all of the said acts of the defendants were done intentionally and deliberately and without excuse, which said acts were in violation of the terms of the decree announced by the court on the 22nd day of October, 1910, and in defiance thereof" and from each and every part thereof.

XII.

These defendants except to the finding of the court wherein the court finds, "That the court further finds that the actions of the defendants tended to defeat and prejudice the rights and remedies of the plaintiffs in the said action of Wm. L. Bilger et al. vs. The State of Washington, King County and C. J. Erickson and did prejudice the plaintiffs in said action and the rights and remedies of the plaintiffs herein," and from each and every part thereof.

XIII.

Defendants further except to that part of the decree wherein "It is therefore ordered, adjudged and considered by the court that the said defendants C. J. Erickson and P. A. Carlson are guilty of contempt of court and they are hereby adjudged guilty of contempt of this court" and from each and every part thereof.

27

XIV.

Defendants further except to that portion of the decree wherein "It is further ordered and adjudged that said defendant C. J. Erickson be, and he is hereby sentenced and fined in the sum of three hundred (\$300) dollars, and further that he be confined in the county jail of Thurston county for a period of sixty (60) days, and that the defendant P. A. Carlson be, and he is hereby sentenced and fined to pay the sum of one hundred (\$100) dollars and the costs of these contempt proceedings," and from each and every part thereof.

XV.

Defendants further except to that portion of the decree wherein "It is further ordered and adjudged that the defendant Erickson stand committed to the county jail of Thurston county, Washington, for a period of sixty (60) days and for a further period sufficient to pay said fine of three hundred (\$300) dollars if the same is not paid, and that the defendant P. A. Carlson also stand committed to the county jail of Thurston county until said fine of one hundred (\$100) dollars and the costs of these contempt proceedings are paid," and from each and every part thereof.

SHANK & SMITH,
Attorneys for Defendants.

The foregoing exceptions presented in court and allowed this 24th day of January, 1911.

By the court:

JOHN R. MITCHELL, *Judge.*

Filed Jan. 24, 1911.

PHIL SKILLMAN,
Deputy Clerk.

28 In the Superior Court of the State of Washington in and for
Thurston County.

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,
vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Notice of Appeal.

To the above named plaintiff and to Thomas A. Meade and P. C. Sullivan, attorneys for said plaintiff:

You and each of you are hereby notified that the defendant and each of them do hereby appeal to the supreme court of the state of Washington from the final judgment in the above entitled court and cause, being that signed and filed therein on the 24th day of January, 1911, and from each and every part thereof.

SHANK & SMITH,
Attorneys for Defendants.

Copy of the foregoing received and due and proper service thereof admitted this 24th day of January, 1911.

THOMAS A. MEADE,
P. C. SULLIVAN,
Attorneys for Plaintiff.

Filed Jan. 24, 1911.

PHIL SKILLMAN,
Deputy Clerk.

29

No. 4503.

STATE ex Rel. CHAS. P. CURTISS, Plaintiff,
vs.

C. J. ERICKSON and P. A. CARLSON, Defendant.

STATE OF WASHINGTON,
County of Thurston, ss:

I, D. G. Parker, county clerk and clerk of the superior court of the state of Washington for Thurston county, do hereby certify that the above and foregoing is a full, true and correct transcript of so

much of the record in the above entitled cause as I am by appellants required to transmit to the supreme court on appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said superior court this 2nd day of February, 1911.

[SEAL.]

D. G. PARKER, *Clerk*.

Indorsed: Filed in Superior Court, Thurston County, Feb. 2, 1911.
D. G. Parker, *Clerk*.

30

Opinion.

By the COURT: I can't escape the conclusion, gentlemen, from all the evidence in this case so far as the facts are concerned, admitting the determination of the two questions of law that I spoke of against the defendants, that this testimony shows that they bring themselves within the rule of acting in such a way as to violate an order of this court. Now, as far as Mr. Carlson is concerned, I would be more inclined not to think that he did, but for the fact that this notice was given to him about twelve o'clock, or a little before, or at least prior to the time that he individually assisted in blowing out the embankment. It may be that he had no notice of it prior to that time since the order had not been noted in writing on the records of this court, but here was a notice that was given to him. He talked about it; put himself on inquiry. Mr. Jones told him to wait while he called up the United States Engineer's office and then he went and assisted in blowing it out. Now, there is one thing about the manner in which the defendants seek to escape in this case. They say that their work had been completed, and yet the very same crew that had been working for the state of Washington, without any new contract whatever, after this notation was handed to Mr. Erickson's partner, and after the United States engineer, who signed the contract, had received a copy of this notice putting them on inquiry and notice, in addition to the pendency of the suit and in addition to the status of this case, Mr. Erickson was in the court room, through his attorneys, at the time this decision was rendered, and through the argument and learned of it at least four days prior to the time that this act was actually committed—from the 22nd to the 26th. I don't think that it is one of those cases that such a strange interpretation should prevail as suggested by Mr. Shank to the effect that if it had been blown up within an hour after the announcement of the court that a technical construction, as placed on it by counsel for plaintiff, could be urged, and they could be held for contempt under those circumstances. Even when a rule is enforced, and which I believe should prevail in this case, it is

31 the same thing as entering the order as contemplated by the statute in contempt cases. There must be some reason for the enforcement of that idea and to say that the announcement made here would apply to the parties in Seattle within an hour, would not be a reasonable one, but that is not the case here. They had four days. There may be an order in this case adjudging each of

the defendants in this case in contempt of court. If you desire to be heard from, I will hear you as to the punishment. I want the order in addition to that to recite that the court finds that the effect of such act was to the prejudice of the successful parties in the case of Wm. L. Bilger et al. vs. State of Washington et al., and as a punishment; the punishment to be imposed in the order; it may be provided that the defendant Erickson pay a fine of three hundred (\$300) dollars and be confined in the county jail of Thurston county, Washington, for a period of sixty (60) days and that Carlson pay a fine of one hundred (\$100) dollars and the costs of the suit against both.

By Mr. SHANK: Now, if the court please, I desire to give notice of appeal from the decision of this court and ask the court to fix the amount of bond that should be given.

By the COURT: Well, I think Mr. Shank, so far as the question is concerned it may be among other things double the amount of the fine that is imposed, then in addition to that I should think two hundred and fifty dollars additional would be sufficient; that would make a bond of ten hundred and fifty dollars. Now in that bond Mr. Carlson shouldn't be held responsible. That is only half of that bond.

By Mr. SHANK: I suggest the court fix the bond in reference to each of them. I am not particular how much the court fixes the bond. Fifteen hundred dollars is all right with us for the two of them.

By the COURT: Very well, then, that may be the amount.

32 In the Superior Court of the State of Washington for
Thurston County.

STATE ex Rel. CHARLES B. CURTIS, Plaintiff,

vs.

C. J. ERICKSON and P. A. CARLSON, Defendants.

Certificate.

I, J. R. Mitchell, Judge of the superior court of Thurston county and the judge presiding at the trial of the foregoing case, do hereby certify that the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in the case. Same are hereby made a part of the record therein.

That the foregoing contains all the material facts, matters and proceedings heretofore occurring in the case and not already a part of the record herein.

This certificate settling said statement of facts is made pursuant to notice served upon the attorneys for plaintiff and at the time of the settlement thereof, the parties hereto were represented by their respective counsel.

Done in open court this August 24th, 1911.

JOHN R. MITCHELL,

*Trial Judge and Judge of the Superior Court
of Thurston County, Washington.*

33

PL'NT'FF Ex. 1.

In the Superior Court of the State of Washington in and for the
County of Thurston.

No. 4204.

WILLIAM L. BILGER and SALLIE BILGER, His Wife; CHARLES P.
Curtis and Pearl H. Curtis, His Wife; Harry H. Hurlbut and
Pauline Hurlbut, His Wife; Frank J. Victor and Lillian Victor,
His Wife; Jacob R. Nachant and Frances M. Nachant, His Wife,
Plaintiffs,

vs.

THE STATE OF WASHINGTON, KING COUNTY, and C. J. ERICKSON,
Defendants.

Decree.

This cause having been heretofore submitted to the court for decision upon the pleadings, proofs and entire records, and the court having heard the arguments of counsel, for the plaintiff as well as the defendants, and having at the conclusion of such argument on the 22nd day of October, 1910, in open court announced his finding and decision that the plaintiffs were entitled to the relief as prayed for in their complaint, and directed the preparation and presentation of decree to that effect.

Now, upon motion of plaintiffs, it is ordered, adjudged and decreed that the plaintiffs and each of them are the owners of the several tracts of lands and shore lands described in the complaint herein, and of all riparian and other rights pertaining to shore lands and to lands abutting upon navigable waters. That the proceedings heretofore taken by the defendants herein as set forth in the pleadings in this cause for the excavation of what is known as the Lake Washington Canal, and the lowering of the waters of said Lake Washington, impair the value of said plaintiffs' property and if consummated will cause great and irreparable damage thereto and are a violation of the constitution of the United States and of the State of Washington. That none of the defendants have any right to lower the waters of said Lake Washington, nor to take or damage any of

the property or property rights of the plaintiffs described in
34 the complaint herein. That the plaintiffs are entitled to and are hereby respectively confirmed in the use and enjoyment of their rights of access and navigation and other riparian rights pertaining to their several tracts of land abutting upon said Lake Washington, and as shore land owners thereon. That the assessment threatened to be levied by King county as shown in the pleadings herein and the threatened issue of warrants thereunder are and each of them illegal and void and in violation of said constitutional provisions, and constitute illegal and inequitable clouds upon the titles of the plaintiffs to said respective tracts of land and shore lands de-

scribed in said complaint. That the defendants herein, the State of Washington, King county, and C. J. Erickson and each of them, their servants, officers, agents, employes, and representatives, be and they are hereby restrained and perpetually enjoined from taking further proceedings to the effect and intent of excavating said Lake Washington canal, or any part thereof, or of lowering the waters of said Lake Washington, or of levying said assessment, or of issuing any warrants thereunder, or creating any indebtedness of said state or of said county, for the purpose or with the intent of excavating said canal, or for the purpose or to the end and effect of lowering the waters of said Lake Washington. And that the plaintiffs recover from the defendants above named their costs and reasonable disbursements herein.

And it having this day been brought to the attention of the court that since the announcement of the decision of this court in this cause, and *or* or about four o'clock P. M. of October 26th, 1910, some person or persons, by the use of dynamite or other explosive, tore the bottom of the ditch of excavation so as to lower the bottom thereof below the surface of the waters of said Lake Washington, and thereby turn the waters of said lake into the ditch or canal, and that such condition if continued will probably result in inflicting damage upon the plaintiffs sought to be prevented by the decree in

this cause, and it having been suggested to the court that
35 such act was committed by some of the defendants other than State of Washington and county of King, their servants, agents, employes or representatives.

Now therefore it is further ordered and adjudged by the court that jurisdiction of this cause be and the same is retained to the extent and purpose of enabling the court after further investigation and hearing, to make such further supplemental order or decree herein touching said alleged acts committed subsequent to the announcement of the decision of this court of October 22nd, 1910, as the court on such hearing may find to be just, equitable and proper in the premises.

Ordered, adjudged and decreed in open court this 28 day of October, 1910.

JOHN R. MITCHELL, *Judge*.

Receipt of a copy hereof admitted this 27th day of Oct., 1910.

HAROLD PRESTON,

Attorney for Def'ts.

No. 4204. 28/202. In the Superior Court of the State of Washington for Thurston County. Wm. L. Bilger, Plaintiffs, vs. State of Washington et al., Defendants. Notice and Decree. Filed in Superior Court Thurston Co. Wash. Oct. 28, 1910. W. M. Nunn, Clerk. Thomas A. Meade, Attorney for Pl't's, 920 Leary Bldg., Seattle, Washington.

36 **STATE OF WASHINGTON,**
 County of Thurston, ss:

I, W. M. Nunn, County Clerk of Thurston County and ex-officio clerk of the superior court of the state of Washington for Thurston County, holding sessions at Olympia, do hereby certify that the foregoing is a true and correct copy of the original decree in case of William L. Bilger et al. vs. State of Washington, King County, and C. J. Erickson, cause No. 4204, as the same appears on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 28th day of Dec. 1910.

[SEAL.]

W. M. NUNN,
*County Clerk and Clerk of the Superior Court
 of Thurston County, State of Washington.*

Indorsed: 4503. Filed in Superior Court Thurston Co., Wash., Dec. 29, 1910. W. M. Nunn, Clerk.

37 In the Superior Court for the State of Washington for
 Thurston County.

No. 4204.

WILLIAM L. BILGER et al., Plaintiffs,

vs.

THE STATE OF WASHINGTON, KING COUNTY, and C. J. ERICKSON,
 Defendants.

To C. J. Erickson, Defendant:

You are hereby notified that said court in the above entitled action, on October 22, 1910, rendered a decision on the merits in favor of the plaintiffs granting them relief in full as prayed for in their complaint, and ordered an injunction to be issued against the defendants doing any acts complained of, and particularly against the defendants further excavating the channel or canal between lakes Washington or Union and lowering the waters of Lake Washington; that the final decree making said injunction permanent is about to be entered and you are hereby notified not to remove the barrier of earth between the waters of Lake Washington and the channel which you have excavated under the contract in controversy in this action, and not to do any act which will lower, or tend to lower the waters of Lake Washington; and that if you do any such act, it will be contempt of court and you will do it at your peril.

Seattle, Washington, October 26, 1910.

THOMAS A. MEADE,
Attorney for Plaintiffs.

Indorsed: Pl'tff. Ex. 7. Notice. Served on Major Kutz 10:30 a. m. 10/26. Filed in Superior Court Thurston Co., Wash. Dec. 29, 1910. W. M. Nunn, Clerk.

38 In the Supreme Court of the State of Washington.

No. 9222.

WILLIAM L. BILGER et al., Respondents,

v.

THE STATE OF WASHINGTON et al. and C. J. ERICKSON, Appellant.

Order.

This cause coming on regularly this 7th day of November, 1910, upon the application of the appellants for an order of this court, modifying and superseding the final decree of the superior court of Thurston county, of date October 28, 1910, the parties appearing by their respective counsel, the court after listening to argument, being fully advised in the premises, does

Order that said final decree be and the same is hereby suspended and superseded to the extent of allowing the appellants, or either or any of them, to open the gates now installed between Lake Washington and Lake Union, and permit the waters of Lake Washington to flow therefrom until the 1st day of March, 1911, provided, that in no event shall the waters of Lake Washington be lowered below the mean summer level of said lake. As to all other matters said application is taken under advisement.

Dated this 7th day of November, 1910.

STATE OF WASHINGTON,

County of Thurston, ss:

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of the order of the court as the same was entered on the 7th day of November, 1910.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 28th day of December, 1910.

[SEAL.]

C. S. REINHART, *Clerk.*

Indorsed: Def. Ex. A. Filed in Superior Court Thurston Co. Wash. Dec. 29, 1910. W. M. Nunn, Clerk.

39 In the Supreme Court of the State of Washington.

No. 9222.

WILLIAM L. BILGER et al., Respondents,

vs.

THE STATE OF WASHINGTON et al. and C. J. ERICKSON, Appellant.

Order.

This cause came on regularly on the 7th day of November, 1910, upon the application of the appellants for an order of this court superseding the final decree of the superior court of Thurston county, of date October 28th, 1910, pending the appeal herein, the parties appearing by their respective counsel, the court after listening to argument entered an order suspending and superseding said final decree to the extent of allowing the appellants or either or any of them to open the gates installed between Lake Washington and Lake Union, and permit the waters of Lake Washington to flow therefrom until the first day of March, 1911; providing, however, that in no event should the waters of Lake Washington be lowered below the mean summer level of said lake, all other matters involved in said application being taken under advisement, and the court being fully advised in the premises, it is

Ordered that said decree of the superior court of Thurston County of date October 28, 1910, be suspended and superseded pending the appeal and until the further order of this court, except in the following particulars: That appellants must still refrain from lowering the waters of Lake Washington except as heretofore authorized by this court under its order of November 7th, 1910; and except that the county of King must still refrain from levying or imposing any assessment on the property of the respondents to defray the expenses of excavating said Lake Washington canal.

Dated this 16th day of November, 1910.

STATE OF WASHINGTON,

County of Thurston, ss:

40 I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of the order of the court as the same was entered on the 16th day of November, 1910.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 28th day of December, 1910.

[SEAL.]

C. S. REINHART, *Clerk.*

Indorsed: Filed in Superior Court Thurston Co., Wash., Dec. 29, 1910. W. M. Nunn, Clerk.

- 41 Filed in Supreme Court Thurston Co., Wash., Jan. 31, 1911.
D. G. Parker, Clerk.

In the Superior Court of the State of Washington for Thurston
County.

No. 4503.

STATE ex Rel. CHARLES P. CURTISS

vs.

C. J. ERICKSON and P. A. CARLSON.

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Filed Aug. 28, 1911.

C. S. REINHART, *Clerk.*

F.

- 42 In the Superior Court of the State of Washington for
Thurston County.

No. —.

STATE ex Rel. CHARLES P. CURTISS

vs.

C. J. ERICKSON and P. A. CARLSON.

Thomas A. Meade and P. C. Sullivan, Attorneys for Plaintiff.
Shank & Smith Attorneys for Defendants.

Statement of Facts.

Before the Hon. John R. Mitchell, Judge Presiding.

By the COURT: Has there been an answer and reply filed or anything of that kind in this case.

By Mr. SHANK: I don't believe I have if your Honor please. I have served them but haven't filed them. Now if the Court please before preceeding on behalf of the defendants I desire to request that a separate trial of these defendants be had. That I take it they are

entitled to. I apprehend that after the trial of one cause that much of the record in that cause may be stipulated into the other hearing but I would like to have the causes tried separately.

By Mr. MEADE: I can't see that any of the rights of the defendants would be prejudiced by a joint trial and I think it is not a matter of rights that they are entitled to consists upon. This all grows
43 out of one transaction and there is a privity of relation between the defendants.

By the COURT: Let me see if I recall. At the time that this original affidavit was presented and an order to show cause was made the question arose as to whether it was a criminal or civil contempt and I had the word criminal erased so as to make it purely a civil contempt.

By Mr. MEADE: Yes, sir.

By the COURT: The motion may be denied and an exception allowed.

By Mr. SULLIVAN: I don't presume the Court cares for an opening statement in this matter. The affidavits and complaints show exactly the facts.

By the COURT: I don't see any necessity for it Mr. Sullivan.

By Mr. SULLIVAN: We desire to offer in evidence the judgment rendered in cause No. 4204 being judgment in the case of William L. Bilger et al. vs. The State of Washington et al. and being the judgment that it is claimed has been violated by these defendants.

By Mr. SHANK: We object to the judgment on the ground that it is incompetent, irrelevant and immaterial for any purpose in this proceeding.

By the COURT: I notice the objection contains the element
44 of its being incompetent. Some question as to whether or not the judgment should be offered in evidence, I mean the form or whether it should be a certified copy.

By Mr. SULLIVAN: We will furnish a certified copy.

By Mr. SHANK: I have no objection to Counsel furnishing a certified copy.

By the COURT: The objection may be over-ruled and an exception allowed. It may be admitted in evidence and marked plaintiff's exhibit "1."

By Mr. SHANK: In order that the record may be clear I take it that the judgment that is offered is the decree of this Court entered on October 28th, 1910.

By Mr. SULLIVAN: That is the one, yes, sir.

By Mr. MEADE: If the Court please by agreement with Counsel in order that the Court may have a clearer understanding of the situation at the time of the alleged contempt I have here photographs of the site prior to the acts complained of and a photograph of the explosion and a photograph showing the condition which was brought about by the acts complained of and I desire with the consent of counsel for the defendant, I desire to offer them in evidence with the privilege of withdrawing them.

45 By Mr. SHANK: I have no objection to the introduction of these photographs nor do I require proof of the photographer who took them that they are correct representations. I admit them for the purpose of representing the conditions surrounding the canal. That is the purpose for which they are offered as I understand it.

By the COURT: They may be received in evidence and marked plaintiff's exhibits "2-3-4-5 and 6."

P. A. CARLSON, being a witness called on behalf of the plaintiff after having first been duly sworn, testified as follows:

Direct examination.

By Mr. MEADE:

By Mr. SHANK: On behalf of the defendants we object to the calling of the defendants or either of them for the reason that this proceeding is in the nature of a contempt proceeding, if not criminal quasi criminal, and for that reason a defendant cannot be called and testify against himself.

(Argument.)

By Mr. SHANK: I think I am right but in order to save time I will waive my objection.

By the COURT: You may proceed to examine Mr. Meade.

By Mr. MEADE:

Q. What is your full name?

A. Peter A. Carlson.

Q. What is your business Mr. Carlson?

46 A. I am a carpenter by trade.

Q. Where do you reside?

A. Seattle.

Q. By whom are you employed?

A. By C. J. Erickson.

Q. By whom were you employed on the 22nd day of October?

A. C. J. Erickson.

Q. By whom where you employed on the 26th day of October 1909?

A. I think I was employed by F. A. Linquist.

Q. October 26th.

A. 1909.

Q. 1910 I mean.

A. Well the same party C. J. Erickson.

Q. In what sort of work and where were you working at that time for Mr. Erickson.

A. The 22nd?

Q. The 26th.

A. I think I was at the canal part of the day and part of the day I was up on Sanaca Harbor.

Q. What part of the day were you employed and working on the Lake Washington Canal?

A. I got out there a little bit after ten o'clock.

By Mr. MEADE: Now if the Court please I desire to ask or offer this first, ask the witness if he received a copy a notice of which this is a copy on the 26th day of October 1910 while working upon the Lake Washington Canal.

Q. Mr. Carlson look at that paper and tell the Court whether or not you received or had handed to you a copy of that paper
47 on that date?

A. There was a fellow working out there by the name of James Kruse he handed me this paper about quarter to twelve.

Q. When you received that paper what did you do with it?

A. I took it and kept it until Mr. Jones came out.

Q. When Mr. Jones came out what did you do with it?

A. I handed it to him.

Q. What is Mr. Jones' position with Mr. Erickson is he employed by Mr. Erickson?

A. I couldn't tell you.

Q. Do you ever take orders from Mr. Jones?

A. Oh occasionally.

Q. Do you not as a fact know that he is one of your bosses?

A. Not to any more extent than that I take orders from him occasionally. What more, I couldn't tell whether he is or not. He gives an order occasionally I know that.

Q. He gives an order occasionally?

A. Yes.

Q. And didn't you recognize the fact that he was one of your employers when you handed the notice to him?

By Mr. SHANK: I object to that as leading.

By the COURT: The objection may be over-ruled and an exception allowed.

(Question repeated by the stenographer.)

A. I recognized him as being in some connection but not but in what respect I ain't certain.

By Mr. MEADE:

Q. Mr. Carlson answer my question, didn't you recognize him as one of your employers before you took orders from him.

By Mr. SHANK: I object to Counsel cross examining his
48 own witness I further object to this question on the ground that it is leading and I further object to it on the ground that it is calling for the conclusion of the witness. I don't know of any rule of law that permits a plaintiff to cross examine a defendant simply because he is a defendant when he calls that witness as his own witness.

By the COURT: I understand that that proposition has been directly passed upon by the Supreme Court against your contention Mr. Shank. He is supposed to be a hostile witness because he is an adversary. The objection may be over-ruled and an exception allowed.

(Question repeated by the stenographer.)

A. Well I recognize him in the respect that I told you that I know that he gave an order occasionally and I have seen him in the office but the position he holds in the office I couldn't say.

By Mr. MEADE:

Q. Does he give orders as coming from himself?

A. It sounds that way.

Q. Now Mr. Carlson I want to get back a little; were you employed by Mr. Erickson on the 23rd day of October?

A. Yes, sir.

Q. 1910?

A. Yes.

Q. Were you at work on the canal cut on the 23rd day of October?

49 A. I had men working at three places so I couldn't say just what time I was there until I looked up my time book.

Q. You had men working there did you?

A. Yes.

Q. On the 24th day did you have men working on the Lake Washington Canal cut?

A. Yes, sir, the 24th day of October.

Q. The 24th day of October.

A. Well I think I had I couldn't say exactly we was working there about a month you know.

Q. Did you have men working there on the 25th?

A. Yes, sir.

Q. What did Mr. Jones say to you when you handed him that notice?

A. Well I couldn't tell you just the words he said. One he said he told me to stay around there a little while he said.

Q. Did he tell you to proceed with the work?

A. Not at that time.

Q. When did he tell you to proceed with the work?

A. About 1:30.

Q. At what time did you hand him that notice?

A. At one o'clock somewhere around there.

Q. Mr. Jones is not an employee of the United States engineer's office is he?

A. No.

Q. Pursuant to the order which Mr. Jones gave to you after handing him that notice what did you do?

A. I go ahead with the work.

Q. What do you mean by going ahead with the work explain more in detail.

50 A. Well I told the men to go to work and scrape some dirt out of there and get ready for the blasting.

Q. Who set off the blast?

A. I set off some of them.

Q. Who set off the others?

A. Oh the other men I had there.

Q. Who was the other man?

A. James Kruse.

Q. Was he employed by Mr. Erickson?

A. Yes, sir.

Q. Did you communicate with Mr. Erickson at all other than handing Mr. Jones that notice?

A. No.

Q. When you set off that blast did it connect the water of Lake Washington with the canal cut and with Lake Union?

A. It connected the canal cut, yes.

Q. Did it connect with Lake Union?

A. There is a gate between so they can't be connected. They are connected in one respect.

Q. Was that open or was it closed?

A. It was open.

Q. Did it remove the embankment which until that time held the waters of Lake Washington at their natural level?

A. It removed part of it.

Q. What became of the other part?

A. It was washed out.

Q. Immediately.

A. Well it started immediately.

Q. Did it cause the water to flow through the channel of the so-called Lake Washington canal?

51 A. Yes.

Cross-examination.

By Mr. SHANK:

Q. Mr. Carlson this man Chris Kruse he gave you this notice that is not in evidence,—

By Mr. MEADE: Well if the Court please I desire to offer that notice in evidence as plaintiff's exhibit "7."

By Mr. SHANK: I object to it as incompetent, irrelevant and immaterial.

By the COURT: The objection may be over-ruled and an exception allowed. It may be admitted in evidence and marked plaintiff's exhibit "7."

By Mr. SHANK:

Q. This contract for the digging of the canal is with Mr. Erickson personally is it not?

A. So I understand.

Q. You were foreman out there on the works?

A. Yes, sir.

Q. Now Mr. Carlson you were taking out the dirt from around the locks and down in front of the embankment were you not?

A. Yes.

Q. And during the forenoon you were called to another part of the work?

By Mr. MEADE: I object to that as leading and not proper cross

examination and not responsive to the direct testimony. I will withdraw the objection as to cross examination. I lost sight of
52 the fact that it was cross examination. Well I will withdraw the objection entirely. If the Court please under the line suggested by your Honor and under the line that I have grown to understand is your Honor's policy to let in all the testimony on the other side I will withdraw the objection entirely.

By the COURT: We will settle the question of the rule with Mr. Shank later on after the testimony is in.

By Mr. SHANK:

Q. Mr. Carlson did you know prior to the time of the receipt of defendants' exhibit "7" which is this notice that there was any suit or proceeding pending in this Court or any other court with reference to the opening of that canal?

A. No, sir.

Q. Did you know at that time that this Court had announced any decision that in any wise effected anyone's rights in connection with that canal?

By Mr. MEADE: I desire to suggest that while I am willing to let in a great mass of testimony that may not be relevant yet I want to ask Mr. Shank's consideration of the fact that we don't want the record swelled full of facts that are immaterial and that has no bearing upon the issues.

By Mr. SHANK: I will change my course of examination then.

Q. Did anyone serve on you this notice defendants' exhibit "7"?

A. Not on me.

53 Q. Who gave you that notice?

A. James Kruse.

Q. He was one of the employees there on the works was he?

A. Yes.

Q. Do you know who left it with James Kruse?

A. No.

Q. Now Mr. Carlson when you received that notice you pulled your men off of the work didn't you?

A. Yes, sir.

Q. And didn't go back to work again until about half past one o'clock in the afternoon?

A. Yes.

Q. When it was reported to you that the United States Engineer in charge of the work directed the work to proceed?

By Mr. MEADE: I object to that as leading. We don't think he should put the answer in the witness's mouth.

By the COURT: The objection may be sustained and an exception allowed.

By Mr. SHANK: The Court will appreciate the fact that I mean no discourtesy to the Court if I trespass on the rulings of the Court for I have no other way of making my record.

By the COURT: That is entirely correct Mr. Shank, you may take your own course.

By Mr. SHANK:

Q. Do you know anything about the arrangement between Mr. Erickson and Mr. Jones?

A. No.

54 Q. What was reported to you as the authority for your proceeding with the work that afternoon?

A. It was reported for me to go ahead and take it out.

Q. What was the authority that was reported to you upon which you proceeded?

A. The authority was Captain William had told him to go ahead, in charge of the government engineer's office.

Q. Did you receive any orders from Mr. Erickson to go ahead?

A. No.

Q. Who was the representative upon the works of the United States government?

A. There was one fellow there staying all the time, a watchman, his name is Hans Bastion.

Q. And who was the engineer in charge of the work that is the surveyor?

A. The surveyor was Mr. Barrows.

Q. Who was the superintendent over Mr. Barrows?

A. Mr. Klapp.

Q. And this Captain Williams you refer to was the officer in charge of that department?

A. At that time.

Q. Was Mr. Barrows and Mr. Clapp on the grounds at the time you received the orders?

A. Mr. Barrows was.

Q. Had you any communication with Mr. Erickson that day?

A. No.

Q. Did anyone report to you a message from Mr. Erickson?

A. No.

55 Q. I now refer you to plaintiff's exhibit "4" and ask you to state to the Court what was the barrier that existed there between the waters and the canal, how much of an effort would there have been necessary to have opened that canal so the waters would have flown over?

A. It would flow over itself if there was about four inches.

Q. About four inches more; what would have been the effect if the waters had flown over there?

A. Gone through the canal.

Q. It would have washed out this barrier would it not by its own weight?

A. Yes.

Q. Now after this barrier was taken away do you know of your own knowledge whether as a matter of fact the actual level of the lake was reduced?

A. No.

Q. You don't know of your own knowledge?

A. I don't know.

Redirect examination.

By Mr. MEADE:

Q. Mr. Carlson how high was that barrier?

A. About four inches above the water at that time.

Q. And how high from the bottom of the canal cut to the top of the embankment.

A. To the top of the barrier?

Q. To the top of the embankment from the surface to the bed of the canal.

A. You mean the embankment that was between the lake and the canal?

Q. Yes.

A. From the bottom it was about two feet six as close as I
56 can state it.

Q. How thick was it?

A. Well, I couldn't say exactly, on the top there was about six inches and on the bottom I couldn't give you.

Q. Did you ever measure it?

A. No, I never measured it.

Q. Your work upon the cut there prior to this time was under the orders of Mr. Erickson was it not; you had been working,——

A. Yes. Yes.

Q. You were working there the 22nd, 23rd, 24th, 25th and 26th under his orders?

A. Yes.

Recross-examination.

By Mr. SHANK:

Q. Mr. Carlson,——

A. Well just a word. The particular order for the work was given by Mr. Klapp from the engineer's office. He gave me the specifications and plans and Mr. Klapp came out there some times and gave his orders.

By Mr. MEADE:

Q. Did Mr. Klapp pay you your wages?

A. No.

Q. Who paid you your wages?

A. Mr. Erickson.

Q. How long have you been accustomed to taking orders from Mr. Jones?

A. Oh occasionally since I started to work for Erickson.

Q. How long has that been?

A. That was in July or August sometime.

Q. What year?

57 A. This year.

By Mr. SHANK:

Q. Mr. Carlson you say the particular orders that afternoon were given by Mr. Klapp?

A. That afternoon,—no,—

Q. That afternoon,—

By Mr. MEADE: It seems to me that that is putting the answer into the mouth of the witness. He testified that the particular orders were given by Mr. Jones.

By Mr. SHANK:

Q. You spoke Mr. Carlson about some orders being given by Mr. Klapp?

A. Yes.

Q. Mr. Klapp is whom?

A. He is the field engineer for the United States Engineer's office.

Q. The field engineer?

A. Yes.

Q. And he was upon the work there was he?

A. Yes, he was out there every day almost, anyhow once a day.

Q. And you received your orders from him in the work?

A. Yes, the particular order about the work I received from him.

Q. Had that been the custom on the work ever since you began the excavation of the canal or since you began the work on the canal yourself?

A. Mr. Klapp.

Q. Yes.

A. Yes, he gave me the first orders when I started.

58 By Mr. SULLIVAN:

Q. Mr. Carlson did Mr. Klapp give you orders personally on the 26th to blow out this embankment?

A. No.

Q. Was he there?

A. No.

Q. Had he been there that day?

A. No, he was there the day before.

Q. Did he give you any orders (to yourself) at any time to blow out this embankment?

A. He spoke about it the day before, asked me how I was going to do it and I told him and he said that would be all right.

Q. That was before this notice was served upon you?

A. Yes.

Q. And that is the last time you saw Klapp before this was blown out?

A. Yes.

(Witness excused.)

Mr. C. J. ERICKSON, being a witness called on behalf of the plaintiff after having first been duly sworn, testified as follows.

Direct examination.

By Mr. MEADE:

Q. What is your full name Mr. Erickson?

A. Charles James Erickson.

Q. You live in Seattle?

A. Yes.

Q. Are you one of the defendants named in the suit of William L. Bilger et al. against the State of Washington, King County and C. J. Erickson?

59 A. Yes, sir.

Q. Who were your attorneys in that matter Mr. Erickson?

A. Last spring Mr. Preston and Judge Green had it in charge.

Q. Mr. Myers?

A. Yes.

Q. Were you carrying on this work under a contract with the State of Washington?

A. Well I couldn't say if it was the State of Washington.

Q. Have you a copy of that contract Mr. Erickson?

A. I think the last one Mr. Shank has.

Q. You drew your money from the State of Washington; you drew your warrants from the State?

A. All warrants came through the United States Engineer's office.

Q. Did you get them from the State Auditor?

A. No, I got them from the United States Engineer's office.

Q. Were they signed by the State Auditor?

A. Yes, sir.

Q. What was the size of this embankment; standing on the 23rd day of October 1910 between Lake Washington and the canal cut?

A. I couldn't say, I wasn't there on the 23rd. I was there the day before they opened up the water, that would be the 26th ain't it.

Q. The 25th.

A. The 25th.

Q. What was the size of it then Mr. Erickson?

A. Well I would say from two and a half to three feet high and it was just a little above the surface and the bottom sloped so it got deeper as it went out.

60 Q. Did you have men working there on the 25th?

A. The 25th we were there, they were just about through.

Q. Did you have men working there on the 25th?

A. Yes.

Q. Did you have men working there on the 24th?

A. Yes.

Q. Have men working there on the 23rd?

A. Yes, they worked there continuously except Sundays.

Q. And you were deepening and working in the canal excavation?

A. Yes.

Q. And working up toward this barrier?

A. Yes.

Q. When was the powder put into the ground before this blasting?

A. I couldn't say.

Q. Was it there on the 25th when you were there?

A. I don't think so. We didn't have any powder there that I know of.

Q. Well did you have any dynamite there?

A. No, I didn't have any kind of explosive.

Q. Was there any explosive used in blowing up that embankment?

A. Well according to the statements here, yes.

Q. Whose statements?

A. The first I heard of it was in the afternoon between four and five, they said they had put powder in there and blowed up the embankment.

Q. Who said that Mr. Erickson?

A. I think it was Mr. Jones.

Q. What relation is Mr. Jones, is he in your employ?

61 A. He is a partner of mine.

Cross-examination.

By Mr. SHANK:

Q. You say the first you heard of this was after it was done?

A. I think it was between four and five o'clock in the afternoon.

Q. Was it done pursuant to your orders?

A. No.

Q. Did you know that it was going to be done?

A. No, I did not.

Redirect examination.

By Mr. MEADE:

Q. Mr. Erickson did you order it to be done?

A. I did not know that they had done anything of that kind.

Q. Did you not know on the 25th day of October when you were there that they were preparing to do it?

A. I heard if you want me to say what I heard from Klapp, of course that is not the question.

Q. Did you order or direct your men to cease work and not to remove the embankment?

A. No, I did not.

Q. Did you call up Mr. Preston your attorney in the case on the afternoon?

A. No, I did not.

Q. Do you know who did from your office?

A. I know I did not. I don't know.

Q. Did you communicate with your lawyers at all that day?

A. No, sir.

Q. Had you communicated with them after the court rendered the decree?

A. I didn't know anything about the decree.

Q. Don't you read the newspapers?

A. I do sometimes, yes.

62 Q. Did you not read that in the newspaper?

A. I had seen a notice in the newspaper if I remember right it was stated a sweeping decree to prohibit any further work on the Lake Washington canal or to the lake something like that.

Q. Did you make any inquiry pursuant to that information or notice which came to you in that way?

A. I did not.

Q. Where were you on the 26th day of October?

A. I was part of the time in the office and part of it I was attending to other business.

Q. Where is your office?

A. The Pioneer Building.

Q. Is there a telephone connection between your office and the work upon the canal cut?

A. I haven't got a phone, but there is a phone close to the canal cut.

Q. This phone is frequently used to communicate with your employees?

A. No, we don't use that.

Q. Don't you ever use it?

A. No, I haven't used it.

Q. Does Mr. Jones use it?

A. I don't know as he does. We have no laborers around there at the telephone with- a block or two anyway.

Q. Did Mr. Jones telephone to you that day?

A. No, I don't think he did.

Q. How close is this canal, in the city of Seattle.

A. How close to the City of Seattle?

Q. Is it in the city of Seattle?

63 A. Yes.

Q. How close do the cars run to the place where your men were working?

A. Two or three blocks.

Q. Paved streets throughout that neighborhood?

A. No, there is quite a big stretch there that is not paved streets.

Q. Graded streets?

A. Partly graded.

Q. Twenty-third Ave., is that not a paved street with a car line running on it?

A. Car line and it is partly graded but not paved.

Q. It is regularly traveled?

A. Very little travel.

Q. There is cars running within a couple of blocks of where your men were actually working are there not?

A. Within I should say well they use to run within a thousand feet of where we were working at that time but they run the line, went over to the old portage probably two thousand feet away.

Q. Did you give out any interviews to the newspapers touching that matter that afternoon Mr. Erickson?

A. No, I didn't give out any. They came and asked about it and

I don't remember what was said but I think I said that I had nothing to do with it.

Q. Didn't you say that you washed your hands of it?

A. Something to that effect probably. I don't remember exactly.

Q. Most of the time you were while this was going on you were in your office?

64 A. In the forenoon I was out until about twelve o'clock I came in.

Q. What time did you come back?

A. Oh a little before twelve.

Q. How long did you stay then most of the afternoon?

A. Yes. I went out to lunch and came back I think a quarter to one.

Q. What time did this explosion take place?

A. I don't know. In the afternoon I was told but what time I couldn't say.

Q. What time did you get notice of it according to your statement?

A. I think between four and five.

Q. How close to four?

A. I couldn't say. When Jones came back he told me about it.

Q. How Jones been out there himself personally?

A. He had been out somewhere he hadn't been in the office.

Recross-examination.

By Mr. SHANK:

Q. Is that contract for the excavation of that canal with the Erickson construction company or with C. J. Erickson?

A. C. J. Erickson.

Q. Now Mr. Erickson Mr. Mead asked you if you gave any orders not to open that particular embankment I want to ask you if the opening of that embankment was any part of your contract with the government?

A. I didn't consider it so, no. I had nothing to do with that.

Q. How much cleaning up there were you going to do and then take your men off leaving it just as it was?

65 A. We were there the day before Mr. Klapp was there and he pointed out two or three places especially one place back of the gate or controlling works which they call them and there was one or two places in the bottom he said he would like to take out so we were taking it out a little more even, that was the afternoon before and then we were through. The gates were already turned over to the government and were in their charge which includes the contract, the gates at Freemont which was also turned over.

Q. In your talk then with Mr. Klapp the day before it was understood when you took out that dirt your work was done?

A. Yes, sir.

Q. Did you consider it your duty to give any orders not to do things that were not within your contract?

A. No, sir, I didn't consider that and won't do it either.

By Mr. SULLIVAN:

Q. Your contract called for excavating the dirt between the Lake Washington canal didn't it clear to Lake Washington?

A. That was done last winter. We were through there in April only in connection with the gates, the cojntrolling works there, a little excavation work in connection with that. The big work was done in April and finished.

Q. And your final contract called to excavate all of this dirt at the head there did it not?

A. There were two contracts one included the big cut which we did a year ago and then the controlling works, one at Lake Union and one at Lake Washington and there was some dirt in front of the Lake Washington gates to be taken out.

Q. That was the dirt between the gates and the canal was it not and the bottom of the canal?

66 A. Between the gates and the lake.

Q. But that was the dirt that was blown out on the 26th; it was the balance of the dirt wasn't it; made the connecting link?

A. No the dirt was taken out, what they blowed out was a little soft mud, it was more for excitement than anything else I guess.

Q. Whatever it was,——

A. There was nothing taken out by that blasting, it was only to create a current to go through the gates.

Q. It aided the waters of Lake Washington in running into the canal did it not?

A. You could have done that with a spade or shovel; two or three spades full would have done the same thing.

Q. Two or three spades full would have accomplished it would it?

A. Yes.

Q. Instead of using a spade it was blown out with an explosive and the cut is some thirty or forty feet wide isn't it?

A. Yes, fifty I guess.

Q. After that was done.

A. Well I don't know if it was then, it is now.

Q. Well it did then didn't it?

A. I wasn't there for quite a few days after.

Q. Now it was fifty feet wide wasn't it when you was there then a few days afterwards?

A. The digging was at least fifty feet in the front.

Q. Now then Mr. Erickson who paid the money for working out there on the 26th?

A. I paid them.

Q. They were your employees at that time?

67 A. Certainly.

Q. And you paid them for the work?

A. Yes, sir.

By Mr. MEADE:

Q. Are they still in your employ, Carlson still in your employ?

A. Yes.

Q. You didn't discharge him for doing this act did you?

A. I didn't know he had done that until quite a few days afterwards.

Q. I asked you once before if you read the papers; I will ask you again did you read an account in the paper of Mr. Carlson blowing that out?

A. You can find a good deal in the papers and a good deal of it you find is not the truth.

By Mr. SHANK:

Q. Now as I understand it the day before this cut was blown out Mr. Klapp the United States engineer was out there and you and *you* and he agreed upon certain little work and dirt being taken out and your work was done?

A. Yes, sir.

Q. That didn't include the opening of this canal or the taking out of this embankment?

A. No, sir.

By Mr. MEADE: I want to say to the Court that I am not offering objections to these matters upon the ground or upon the theory that the Court will of its own motion or rather that the Court will not consider any testimony or any evidence that is not proper evidence. I don't want to delay the proceedings by arising every
68 very few moments to object.

(Witness excused.)

HANS BASTION, being a witness called on behalf of the plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. MEADE:

Q. Your full name Mr. Bastion?

A. Hans Bastion.

Q. Where do you live Mr. Bastion?

A. Portage Lake Washington.

Q. Seattle?

A. Yes, Seattle.

Q. What is your business, what is your occupation?

A. I am a United States watchman.

Q. Where?

A. At the Portage.

Q. Were you watchman at the Portage between Lake Washington and Lake Union?

A. Yes, sir.

Q. What was your position on the 26th day of October 1910.

A. I was watchman. I was looking after the new canal.

Q. Did you have any conversation or communication with either Carlson or Erickson on the 26th day of October 1910 relative to the blowing out of this embankment?

A. Mr. Klapp and Mr. Barriows was there the day before,——

Q. Well I didn't ask you that; I want you to answer my question, you didn't have any conversation with them as I understand?

69 A. With Erickson?

Q. Yes.

A. No, sir.

Q. Did you have any conversation with Carlson?

A. Yes.

Q. What did Carlson say to you?

A. I don't remember that.

Q. Did he say anything to you regarding that notice he had received?

A. No, sir.

Q. Did he say anything to you about going ahead and blowing it out?

A. Going ahead with the work, yes.

Q. With Erickson's work?

A. Yes.

By Mr. SHANK: I object to that for the reason that it is leading. It can't be claimed that this witness is hostile.

By Mr. MEADE:

Q. Mr. Bastion in reference to what Carlson said to you,——

A. Mr. Carlson had nothing to do with me.

Q. I say, in reference to what Carlson said to you concerning the proceeding with the work what did you do?

A. I do nothing.

Q. You do nothing.

A. I was there to represent the government.

Q. Were you there when the blast went off?

A. Yes.

Q. What happened at that time?

A. Well I don't remember what happened,——

70 Q. Mr. Bastion what effect did it have upon the embankment?

A. Very little.

Q. What became of the embankment?

A. Some of it washed down below the gate.

Q. Did it blow up?

A. Very little some of it.

Q. Ceased to exist didn't it?

A. The biggest bank is there yet.

Q. The bank is there yet?

A. The biggest part of it, yes.

Q. And it is all a mistake that it was blown up?

A. No, it was no mistake but the biggest part of it is there yet. It has washed down right along, a little at a time.

Q. Was the water flowing from Lake Washington to Lake Union?

A. No.

Q. Did it flow in after this explosion?

A. Yes.

Cross-examination.

By Mr. SHANK:

Q. As watchman out there in the canal you have charge of the gates have you not?

A. Yes.

Q. Are those gates high enough to regulate the level in the lake?

A. No, sir, we can't lower Lake Washington.

Q. I don't mean that, by closing the gates couldn't you maintain the level of the lake at as high a level as it was the day that the embankment was taken out?

71 A. I don't think so.

Q. Well now listen to my question; I show you here plaintiff's Exhibit "3", this shows the gate does it not?

A. Yes.

Q. Now I show you plaintiff's Exhibit "2," that is a little different view of the gate; now if those gates were closed down right how much higher if any would the water of Lake Washington be raised than the waters were at the time that this embankment was taken out.

A. The bottom.

Q. I am not talking about the bottom.

A. When the gates is, well the level of the bottom of the sill is thirty feet.

Q. In other words the bottom of this sill here where I am pointing is thirty feet above datum?

A. Above low water in Puget Sound.

Q. Now the lake at the time the water was blown out was thirty four what?

A. Thirty-four and three tenths.

Q. Now the top of this gate is how much higher than the bottom of the sill?

A. I don't remember that. Mr. Carlson knows the height of the gates.

Q. But you don't know?

A. No, I don't remember. I can't swear to that.

Q. Then the bottom of the sill is thirty feet above datum?

A. Above low water in Puget Sound.

Q. It is called datum and the height of the water at the date of the blowing out of the canal was thirty-four and three tenths?

72 A. Yes, sir.

Q. In other words it was thirty-four and three and one tenths feet higher than the bottom of the sill?

A. Yes, that is right.

Q. Now the waters flowed through the canal after the embankment was opened?

A. Yes.

Q. As government watchman do you have charge of the entire right-of-way?

A. Yes, and also the Fremont gates also.

Q. As watchman do you take measurements of the lake?

A. Yes, three times a day, eight, twelve and five.

Q. How long have you been taking measurements of the levels of the lake?

A. For a little over eight years the 16th of this month, been over eight years.

Q. And you have taken measurements every day during that time?

A. Yes, sir, three times a day, eight in the morning, twelve noon and five in the evening.

Q. Now have you the records with you in which you make your notations as to these different levels?

A. Yes, sir.

Q. Will you produce it?

A. It is in this book from 1904 I think.

By Mr. MEADE:

Q. What do you do with those?

A. Send them in to the United States Engineer's office every Saturday night.

By Mr. SHANK:

73 Q. You make then a record of the height of the water in Lake Washington at eight in the morning, twelve at noon and five in the evening?

A. Yes, sir.

Q. You have been making that record for eight years?

A. Yes, sir.

Q. I wish you would state to the Court what the ordinary summer level of that lake is?

A. Well from 33.10 to 32.09.

Q. When you say 33.10 you mean thirty-three feet and one tenth above low water mark in Puget Sound?

A. Yes.

Q. That is the basis from which you make your calculations?

A. Yes.

Q. And that is what you call datum?

A. Yes.

Q. In other words this figure is 33 feet ten above datum?

A. Yes.

Q. And you say the summer level is from 32.09 to 33.10?

A. Yes, that is right.

Q. That is the summer level?

A. Yes.

Q. 32.09 to 33.10?

A. Yes, that is right.

Q. Now Mr. Bastion that is the ordinary summer level of the lake is it?

A. Yes, in August and September.

Q. Now did you make a record yourself during the month of October of the level of the lake?

A. Yes, sir, I did.

74 Q. Have you got your original notations here with you that you made at that time?

A. Yes.

Q. Will you produce them?

A. Yes, for October.

Q. October, 1910.

A. That is Lake Washington.

Q. To Lake Washington, yes; I wish you would refer to these notations under date of October 22, 1910, and state to the Court what you found the level of the water of Lake Washington to be on October 22, 1910.

By Mr. SULLIVAN: We object to that as immaterial, first on the ground that it is immaterial and second on the ground that it is not cross examination.

By Mr. SHANK: I will say now that if Counsel objects on the ground that it is not proper cross examination I don't think that it is.

By Mr. SULLIVAN: It is immaterial because the contempt in this case is the proceeding with the doing of something that the Court has ordered not to be done. It is immaterial as to what depth the lake was at any particular time. The decree of this Court was expressly against lowering the waters of Lake Washington and it is absolutely immaterial how much or how little it did it. It can't make any difference in this case.

By the COURT: The question has been withdrawn as I understand.

75 By Mr. SHANK: I must withdraw it because it is not proper cross examination in my judgment. I withdraw it upon that ground and close the examination of the witness because all the rest of it would be along the same line.

Redirect examination.

By Mr. MEADE:

Q. Mr. Bastion you say you keep a record of the height of the water out there?

A. Yes, three times a day.

Q. You say 33.09 is the lowest that you have ever found?

A. Yes, sir.

Q. What is the extreme low water mark?

A. I can't tell. It is up and down; heavy rain it goes up, dry weather it goes down.

Q. Well you don't understand my question; you say you have been keeping a record of the level of Lake Washington for eight years?

A. Yes, sir.

Q. During those eight years what is the lowest recorded level of Lake Washington?

A. 33.09, the highest 37.75. That was last year.

(Witness excused.)

By Mr. MEADE: We rest.

C. J. ERICKSON, being a witness called on behalf of the defendants and having heretofore been duly sworn, testified as follows:

Direct examination.

By Mr. SHANK:

76 Q. Your contract in the digging of the Lake Washington canal there was with whom Mr. Erickson?

A. Captain Williams signed the contract.

Q. He was an officer of what department?

A. The engineer's office of the War Department of the United States.

Q. The canal that you dug there was on land belonging to whom?

By Mr. MEADE: I object to that as immaterial.

By Mr. SHANK: I will show that all of these acts were performed on the right-of-way of the United States government.

By the COURT: In addition to the objection suggested by Mr. Meade I am debating the rule with reference to the proof of title to the real estate.

By Mr. SULLIVAN: We make that additional objection that the proof is incompetent.

By the COURT: The objection may be sustained and an exception allowed.

By Mr. SHANK:

Q. Mr. Erickson do you know who was in control of what was known as the canal right-of-way through which this canal passed?

A. The War Department.

Q. Did its control extend over that portion of the right-of-way which included the embankment that was taken out on October 26th?

By Mr. SULLIVAN: We object to that as immaterial and irrelevant. It is wholly material as a question of whether these defendants or any of them violated an order of this Court and it

77 is absolutely immaterial in the case who had control over the work in a general way or otherwise as long as these defendants, unless it is a direct answer to this defendant or these defendants, some of them, tending to show that they did not do it. They wouldn't be justified by saying that they done it at somebody else's request because they had control of it. They don't claim this man was an agent of the United States acting under instructions of the secretary of war or somebody like that. It is an attempt to show that some third party had control of the canal.

(Argument.)

By the COURT: I have had occasion to have a case sent back for retrial because a motion to strike certain testimony was granted, the Court holding that the ruling wasn't right and announced in effect the rule that if testimony go in which is not admissible or relevant to the issues made then it will be ignored and not considered as in the case. Now the question which has been asked here, objected to, and on the objection the argument made, I have con-

sidered more or less heretofore both in the other case and of course while it wasn't presented on the demurr in this case it is one of those motions which may be raised at any time and I am not disposed to shut out any testimony that counsel on either side thinks to be relevant to his client's interest therefore under that rule I shall permit the testimony to go in. This isn't a jury case and it can't do any harm in there except to take up time and space in the record is all. It is not supposed to have any effect upon the final judgment that is rendered and I have usually followed that rule. With that understanding the objection may be overruled and an exception allowed.

(Question repeated by the stenographer.)

A. Yes, sir.

By Mr. SHANK:

Q. Had the United States engineer made his measurements and estimates of the amount that you were to be allowed for the excavating work there?

A. I couldn't say if he had at that date; the day before he was there he explained what he would like to have done.

Q. Mr. Erickson did you on October 26th have a talk with anyone over the phone with reference to the opening of that canal?

A. They phoned up there to my office.

Q. Who phoned up there to your office?

A. I think Mr. Upper.

Q. Is Mr. Upper in your employ?

A. No.

79 Q. Has he any connection whatsoever with your business?

A. No, sir.

Q. What did he say over the phone with reference to it and what did you say in reply?

A. He called me up and said there was a paper served on my workmen there and asked,—I think he asked if I had any objection if they opened up and let the water go through.

Q. What did you say?

A. I answered that I don't want to have anything to do with that; if the government wants to open that up that is their work.

Q. Did you have any conversation over the phone with any other person with reference to that matter?

A. No, I did not.

Cross-examination.

By Mr. MEADE:

Q. You have a contract under which that work is being done have you not?

A. Yes.

Q. Have you with you a copy of that contract?

A. I think Mr. Shank has it.

By Mr. MEADE: I ask Mr. Erickson to produce a copy of that contract.

By Mr. SHANK: If counsel asks me for it I will be glad to produce the copy that I have.

By the Court: Well it is the same thing. You are his counsel in the court-room at the trial of the case.

By Mr. MEADE:

Q. Mr. Erickson I read you a part of this contract and ask you if it is not part of the contract into which you entered: "These articles of agreement entered into this 16th day of August, 1910, between Arthur Williams Captain Corp Engineers United States army hereinafter represented as the contracting officer representing the state of Washington on the one part and C. J. Erickson of Seattle, in the County of King State of Washington hereinafter designated as the contractor of the second part."

A. Yes, that is it.

Q. So Mr. Erickson the only contract or the contract under which this work is being done is a contract with the State of Washington?

A. I couldn't say as to that.

Q. Isn't that the contract under which you are working that I have just read you?

A. Yes, sir.

Q. Have you any other contract under which that work is being done or was being done on that date?

A. No, sir. May I explain to the Court what I mean when I say I don't know?

By the Court: I think that would be entirely proper Mr. Erickson.

By Mr. MEADE: Make any explanation you wish in the matter.

A. Well the engineer for that work and I made my contract there and I didn't have any talk with any state officers. All I know is that the warrants were issued by the State officer but the work as I understood it was direct with the government except the paying of it which come from that appropriation but otherwise I understood it right along in this contract and the former contract that I had to do with the engineer's office representing the war department.

Q. In that former contract did it not state that it was entered into on behalf of the state of Washington?

A. The same form as this contract.

Q. Have you had occasion to get any certificates from the Land Commissioner?

A. No. I got certificates from the engineer's office. He makes the estimates and there I go to get my warrants.

(Witness excused.)

P. A. CARLSON, being a witness called on behalf of the defendant, having heretofore been duly sworn testified as follows:

Direct examination.

By Mr. SHANK

Q. What is the height of the gate of the canal in Lake Washington as shown by Plaintiff's Exhibits "1-2-3-4-5-6 and 7"?

A. Nine feet as close as I measured.

Q. With those gates closed and assuming that the sill on which those gates rest is thirty feet above datum how high would the waters in Lake Washington have to be in order to flow through those gates.

By Mr. MEADE: I object to that as immaterial and irrelevant.

By the COURT: The objection may be overruled and an exception allowed.

A. Thirty-nine feet.

(Witness excused.)

82 HANS BARTON, being a witness called on behalf of the defendant, after having first been duly sworn, testified as follows.

Direct examination.

By Mr. SHANK

Q. Mr. Barton you have with you I believe you testified about awhile ago the original record of the measurements of the waters of Lake Washington from the month of October, 1910?

A. Yes, sir.

Q. Produce the book will you please; by referring to that book can you tell the condition of the waters of Lake Washington for the month of October?

A. Yes.

Q. I wish you would refer to October 22, 1910, and state to the Court what the measurements of the water was in Lake Washington?

A. 34.35.

By Mr. MEADE: We object to this as immaterial.

By Mr. SHANK:

Q. At eight o'clock A. M., 12 o'clock noon and 5 P. M.

By Mr. MEADE: I object to that as immaterial.

By Mr. SHANK:

Q. At 8 o'clock A. M., 12 noon and 5 P. M.

By Mr. MEADE: We object to this as immaterial.

By Mr. SHANK: I propose to show as a matter of fact the level of the waters of Lake Washington were not changed by the opening of that canal and by reference to the affidavit of Mr. Curtiss

83 and the decree of this Court it must be apparent that the only thing they were trying to prevent was the lowering of the waters of Lake Washington.

By the COURT: Mr. Shank it would rather appear to me that you are going to run into a proposition that as I understand is regular in the law, that as a matter of human judgment or measurements anything of that kind are very difficult and usually not presumed to overcome the laws of nature. However, the objection may be over-ruled and an exception allowed.

By Mr. SHANK:

Q. Answer Mr. Bastion what the measurements were on that date at those three hours?

A. The 22nd.

Q. The 22nd.

A. 34.35.

Q. What were the measurements on October 23rd?

A. The same.

Q. What were the measurements on October 24th?

A. The same.

By Mr. MEADE: We have the same objection to all of this.

By the COURT: It may be so understood.

By Mr. SHANK:

Q. What was it on October 25th?

A. The same.

Q. What was it on October 26th?

A. 34.3.

Q. What was it on October,—in order that you may use the same terms and keep the record straight you have testified that it was 34.35?

84 A. Yes.

Q. Then I suggest if the Court please that the witness call it 34.30 instead of thirty-four and three tenths; what was it on October 26th?

A. 34.30.

Q. What was it on October 27th?

A. The same 34.30.

Q. What was it on October 28th?

A. 34.30.

Q. What was it on October 29th?

A. 34.25.

Q. When was the gate closed?

A. The 29th 7:30 P. M. in the evening.

Q. Who ordered the gate closed?

A. Mr. Klapp Assistant United States engineer.

Q. Who ordered you to open the gates when they were opened prior to that time?

By Mr. MEADE: We object to that as immaterial.

By the COURT: The objection may be over-ruled and an exception allowed.

A. Mr. Klapp.

By Mr. SHANK:

Q. Mr. Bastion are the figures which you have given here accurate figures as to the status of the waters in Lake Washington for the dates that you have mentioned?

A. Yes, sir.

Cross-examination.

By Mr. MEADE:

Q. Mr. Bastion what was the condition of the weather at that time was it rainy?

85 A. I hardly think so, no, sir.

Q. Do you know?

A. I ain't quite sure.

Q. On the 26th; did it rain any during the month between the time that these gates were opened?

A. Well more or less.

Q. How much?

A. Oh I can't tell that.

Q. Very much?

A. Not very much, no, sir.

(Witness excused.)

W. G. JONES, being a witness called on behalf of the defendant after having first been fully sworn, testified as follows:

Direct examination.

By Mr. SHANK:

Q. State your full name?

A. W. G. Jones.

Q. You are the same Jones that has been referred to by Mr. Erickson as being a partner of his in his works up there?

A. Yes, sir.

Q. Where were you on October 26th, 1910?

A. I was in the office part of the time. The first thing in the morning I had some conversation with Mr. Erickson and did some other business then I went out on the line of the work and to other places on the canal and was there in the neighborhood of ten o'clock or a little after.

Q. When you arrived at the canal what were the men doing by way of cleaning up around there?

86 A. They were taking out some of the higher places in the canal smoothing up the bottom of the canal.

Q. How long were you there?

A. A few minutes, fifteen or twenty minutes.

Q. While you were there was this Plaintiff's Exhibit "7" brought to your attention?

A. No, sir.

Q. It was not?

A. No, sir.

Q. When did you return?

A. About one o'clock.

Q. When you arrived there what did you find with reference to this notice having been left on the work?

A. Some one, I think it was Mr. Carlson, handed me a notice and stated that when he had received it he had called his men off and was doing nothing in the meantime.

Q. What did you do and say with reference to proceeding any further?

A. I read the notice; I didn't know how much meaning it carried with it; I tried to get my lawyer two or three of them that might inform me by phone. I tried to get Mr. Erickson and failed to do so and after that I did another errand,—

Q. Let me ask you right there was Mr. Barrows on the works?

A. He was.

Q. Barrows was the engineer of the works as I understand it is that correct?

A. Yes, sir.

Q. Did you receive any orders from Mr. Barrows with reference to opening up the embankment?

A. Mr. Barrows told me that he had been in communication with Captain Williams and Captain Williams stated that he had a similar communication and he didn't consider it authentic and wanted us to open up the embankment.

Q. Did you have this conversation with him yourself?

A. I did.

Q. Pursuant to that what did you do?

A. I endeavored to get the attorneys I referred to a minute ago including Mr. Erickson then I reached Captain Williams personally by phone.

Q. I mean afterwards, after you received these instructions from Captain Williams what did you do?

A. I told the men to open up the embankment according to Captain Williams' orders.

Q. Did Mr. Erickson order that work done?

A. He did not.

Q. Did you have any talk with Mr. Erickson about the opening of that canal?

A. I did.

Q. When did you have that talk?

A. It was on the morning of the 26th.

Q. What was the occasion of your having talked about it?

A. There had been a notice in the morning to the effect that the embankment would probably be blown out at noon and we talked it over and decided that we wouldn't do it.

Q. Were those Mr. Erickson's instructions when you left that morning?

A. They were.

Cross-examination.

By Mr. SULLIVAN:

88 Q. This Captain Williams you speak of he is the man that signed this contract as representative of the State of Washington is he not?

A. Yes, sir.

Q. Government engineer?

A. Yes, sir.

Q. And Mr. Erickson was working under that contract?

A. Yes, sir.

Q. And on the morning of the 26th you were there on the ground and was Mr. Erickson there that morning?

A. I saw Mr. Erickson at the office.

Q. That was on the morning of the 26th?

A. Yes.

Q. At that time you had seen something in the paper regarding the blowing out of this remaining earth there is that right?

A. Yes.

Q. You had already seen something in the paper had you not in connection with the fact that Judge Mitchell had announced his opinion in this case some days prior?

A. I had seen a notice or an account or something of the fact.

Q. In the newspaper?

A. Yes.

Q. And this was referred to in this same article where it spoke about blowing out the dirt also was it not?

A. I don't remember that it was.

Q. Now what connection did you have with Mr. Erickson in a business way?

A. I was a partner of his.

Q. The contract was made in Mr. Erickson's name personally was it not?

A. Yes.

89 Q. Now you and he discussed this matter in the morning after reading the paper and concluded that you wouldn't do it yourself?

A. Yes.

Q. And after that you called up Captain Williams?

A. Yes.

Q. He made this contract with Erickson?

A. Yes.

Q. And after you talked with Williams you went ahead and ordered it done?

A. Carried out his orders, yes.

Q. Well you went ahead and had it done did you not?

A. Carrying out his orders yes.

Q. After this you ordered your men to blow this up did you not?

A. I did.

Q. That was the men employed by Erickson in doing this work out there was it not?

A. Yes, sir.

Q. They had been right along in Mr. Erickson's employ?

A. They had.

Q. Did Mr. Erickson to your knowledge give any directions to the men out on the ground in regard to this matter at all?

A. I am very sure he did not.

Q. Of any kind?

A. No, sir of no kind.

Q. Now Mr. Jones you knew that this suit had been pending over here in Olympia during this time this Bilger case?

A. I did.

Q. And you knew it had been finally decided?

90

A. I did not.

Q. You had read it in the newspapers?

A. That didn't make me believe it.

Q. Well had you read it?

A. I had read it.

Q. And Erickson had seen it also in the newspapers?

A. I don't know that he had.

Q. How did you come to discuss it then?

A. We didn't discuss the decision of the Court, we discussed the article in the paper that the blowing out was to be done at noon.

Q. If neither you nor Mr. Erickson discussed anything about the opinion of the Court how did it occur that you and Mr. Erickson were talking about not blowing this out; what was the occasion of your talking it over?

A. Well it wasn't in the immediate contract. The contract that we had we were finishing up our work and if the blowing out should come we didn't care to do it ourselves. We didn't think it was our place to do it.

Q. At that time neither you nor Erickson had any information whatever, the newspapers or otherwise, that the Court had announced its opinion enjoining the further excavation there is that correct?

A. At what time do you refer?

Q. When you and Mr. Erickson had this conversation.

A. On the morning of the 26th?

Q. Yes.

A. I don't know whether Mr. Erickson had seen it or not. I had seen some little scribb in the paper regarding it but to me it was no evidence.

91

Q. Isn't it a fact that you and Mr. Erickson talked about that matter that morning because you had seen something in the paper that morning about Judge Mitchell having rendered his opinion?

A. We did not. We did not talk on that phase of it.

Q. Then the fact, you don't wish then to convey the impression that Mr. Erickson was endeavoring to comply with the order of the Court when you and he had this agreement because he didn't know anything about any order is that correct?

A. We certainly did not know the Court had rendered any decision, and that we did not enter into it at all. We considered this, or I did, I felt this, expected this, if the Court had rendered a de-

cision we would have had official notice and that we could not take a newspaper notice for anything of the kind.

Q. Mr. Jones what time did you say you first saw this notice?

A. About one o'clock.

Q. Did you call Mr. Williams up before you saw this notice?

A. I did not.

Q. You didn't call him up in the morning after you talked to Mr. Erickson?

A. No, sir.

Q. And Williams told you he had a similar notice?

A. I called him up after I got this notice.

Q. And he told you he had a similar notice?

A. Yes.

Q. He is the same Williams we have been talking about all the time here?

A. Yes, sir.

By Mr. MEADE:

92 Q. Mr. Jones you say you saw a little *scribb* in the paper, isn't it a fact that it was a long article with a big heading that you saw concerning this instruction being granted?

A. As I remember it it was a short article and had no big head lines.

Q. Who were your counsel in the case, who were your representatives, your legal representatives, who defended the suit of Bilger against the State, Mr. Erickson's representatives and Mr. Jones as a partner, they would be his representatives too?

A. We had no direct attorneys in it until this present time, the present attorneys we have so far as I was concerned.

Q. As a matter of fact didn't they appear in this court as representing you, Myers and Preston and Judge Green?

A. Well they represented as I understood it although I don't speak from direct knowledge the canal association and Mr. Erickson together.

Q. As a matter of fact were your attorneys not in court at the time the Court rendered its decision?

A. I don't know.

Q. You say you tried to get in communication with your lawyers?

A. Yes.

Q. With whom did you try to get in communication and at what time?

A. After I got this notice about one o'clock I tried to get in touch with Mr. Shank and with Judge Green knowing that he was in touch with the case and with Mr. Preston knowing that he was in touch with the case and I failed to get either of them.

Q. Did you attempt to call my office?

A. I did not. I didn't know anything about you in the case.

93 Q. You say they were at work cleaning up the bottom of the cut there what were they working with shovels or scrapers or steam shovels or what?

A. Scrapers with horses.

Q. How many teams did you have at work there that morning?

A. Three or four I think.

Q. How many did you have at work on the 25th of October?

A. I don't know probably the same.

Q. On the 24th day of October?

A. Probably the same.

Q. On the 23rd day of October?

A. Likely the same.

Q. Who is this Walter Barrows that you speak of is he not an inspector?

A. He is the man that gave us our elevations in the work there, the surveyor.

Q. Is he employed by the State?

A. I don't know, I understand he is employed by the government.

Redirect examination.

By Mr. SHANK:

Q. All orders with reference to the work were taken from whom?

A. From the engineer's department usually I understand from Mr. Klapp.

Q. Mr. Jones when Plaintiff's Exhibit "7" was served upon you did you consider this language in it, "That final decree making said injunction permanent is about to be entered," and discuss that at all prior to the time that you called up Captain Williams?

A. I read it with care two or three times and considered the whole thing as best I could.

94 Q. At the time you did that did you consider that by acting you would be in any manner violating any order of the Court made theretofore?

A. I didn't at all.

Q. Did you at any time intend to do anything yourself although you weren't a party to this action, anything that would be contrary to the orders of any Court?

A. No, sir, I did not.

Q. Mr. Jones you were not a party to that action?

A. No, sir.

Q. Bilger against the State and others?

A. No, sir.

Q. And when they were speaking about attorneys you were speaking about Mr. Erickson's attorney in that suit?

A. I presume so.

Recross-examination.

By Mr. MEADE:

Q. Mr. Jones how long have you been in partnership with Mr. Erickson?

A. About two years.

Q. Were you in partnership with him at the time this contract was made by Captain Williams for the State of Washington?

A. I was.

Q. Were you in partnership with him during the time that the work progressed?

A. Yes, sir.

Q. Were you in partnership with him at the time that this embankment was blown out?

A. Yes.

By Mr. SHANK: We object to all of this as immaterial because it would not bind Mr. Erickson at any rate or Mr. Carlson.

(Argument.)

By the COURT: The objection may be over-ruled and an exception allowed.

(Question repeated by the stenographer.)

A. I was.

By Mr. MEADE:

Q. Did you or did you not have considerable control over this work that was going on on behalf of Mr. Erickson and as a directing manager?

A. What do you mean?

Q. Well did you have authority to direct the men at work out there, did the men take orders from you?

A. In a way they did. What I mean by that is this: we were working, the company was working, the men were working under the direction of the engineer's office and the orders were taken from them; any minor orders that would come up I would probably have given them.

Q. Orders were given to you and you gave them to your men?

A. Might have been so.

Q. Was that not an usual method?

A. No, because Mr. Carlson had practically the entire control, he had the plans and carried them out himself.

Q. Was that not the method that was pursued in this case?

A. As I understand the question no.

Q. Did not the orders as you said, orders from Captain Williams come to you?

A. They came to me, yes.

Q. And you conveyed them to Mr. Erickson's employee and to your employee Mr. Carlson?

A. Yes.

By Mr. SHANK:

Q. Mr. Jones, Mr. Meade has just stated in Court here that the purpose of this inquiry was to show whether you were acting for and on behalf of Mr. Erickson or not; I want to direct your attention to that particular statement made in court and ask you whether in conveying the information to Carlson you received from Captain Williams whether you were acting for and on behalf of Mr. Erickson whatsoever?

By Mr. SULLIVAN: I think that is a question of law.

By the COURT: The question may be over-ruled and an exception allowed.

A. I was acting entirely independent of Mr. Erickson, really contrary to our understanding in the morning because Captain Williams had ordered it.

(Witness excused.)

By Mr. SHANK: I desire to offer in evidence a certified copy of an order of the Supreme Court made in the case of Bilger against the State of Washington under date of November 7, 1910, being cause No. 9222 of the Supreme Court of this State.

By Mr. SULLIVAN: We object to it as immaterial.

By the COURT: The objection may be over-ruled and an exception allowed. It may be admitted in evidence and marked defendant's Exhibit "A."

By Mr. SHANK: I desire to offer in evidence a certified
97 copy of order of the Supreme Court made in the same cause under date of October 16, 1910.

By Mr. SULLIVAN: Same objection.

By the COURT: The objection may be over-ruled and an exception allowed. It may be admitted in evidence and marked Defendant's Exhibit "7."

By Mr. SHANK: We rest.

By Mr. SULLIVAN: We desire to offer in evidence a statement sworn statement made by Joseph H. Earle which refers to the levels, different levels of Lake Washington kept in the records of the United States Engineer's office referred to here and accompanying explanations with it, as an official document from the Engineer's office of the United States.

By Mr. SHANK: I object to its being introduced upon the ground that it is incompetent and irrelevant and immaterial, not the best evidence, bears upon its face the fact that it is an affidavit prepared in the office of the counsel for the plaintiff in this case, thus not permitting of any cross examination and certainly this portion of the case cannot be tried on such affidavit. If so, anyone can be fined for contempt on any sort of such testimony.

(Argument.)

98 By the COURT: The objection may be sustained and an exception allowed.

By Mr. SULLIVAN: We rest.

By Mr. SHANK: We rest.

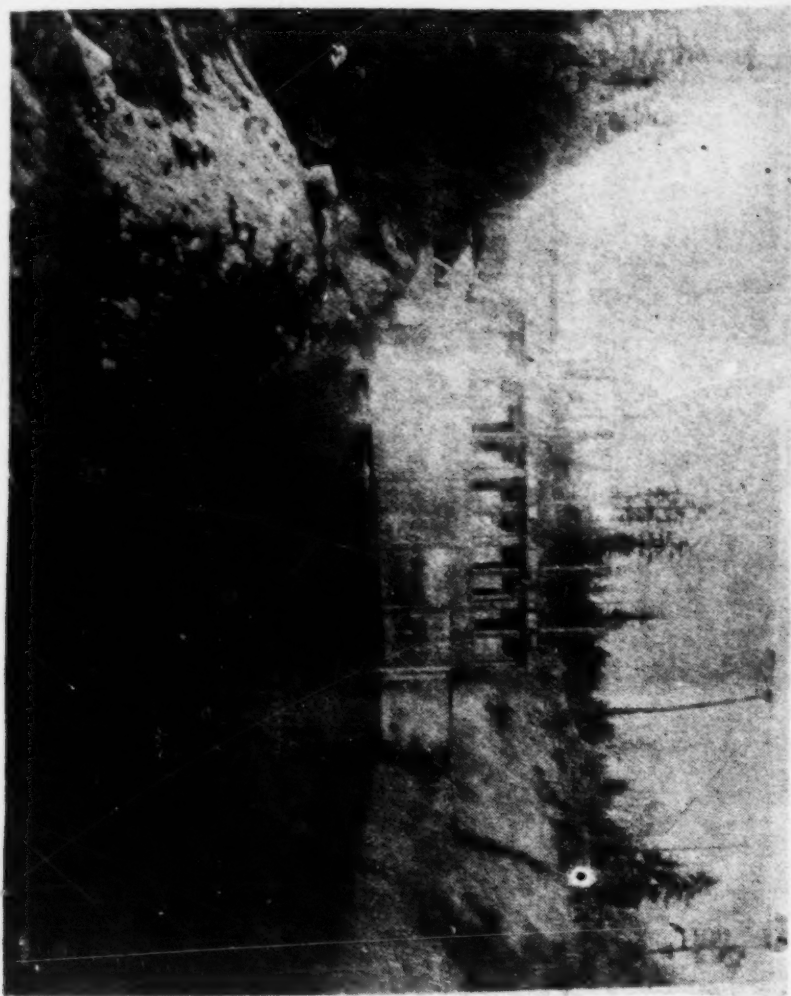
(Argument.)

Opinion.

(Here follow photographs marked pp. 99 to 103, incl.)

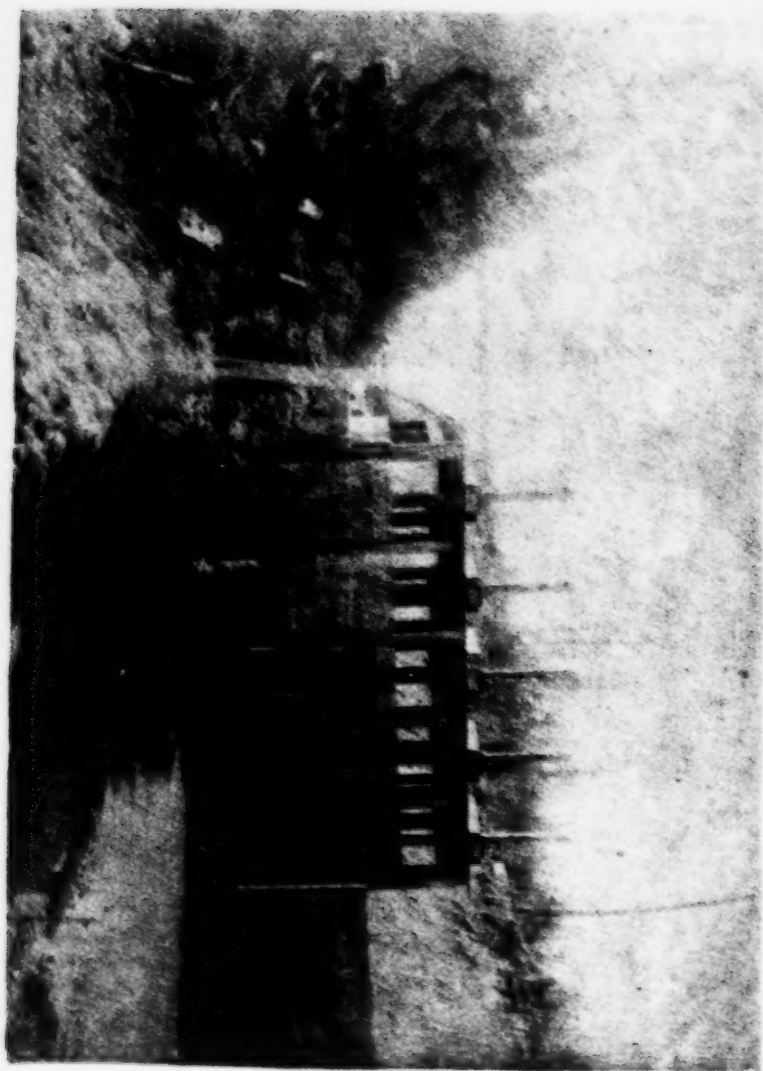


99 [Endorsed on back:] 4503. Oct. 26, 3:50 p. m. Barrier
being blown out, 3:50 p. m. Filed in Superior Court, Thurs-
ton Co., Wash., Dec. 29, 1910. W. M. Nunn, clerk.



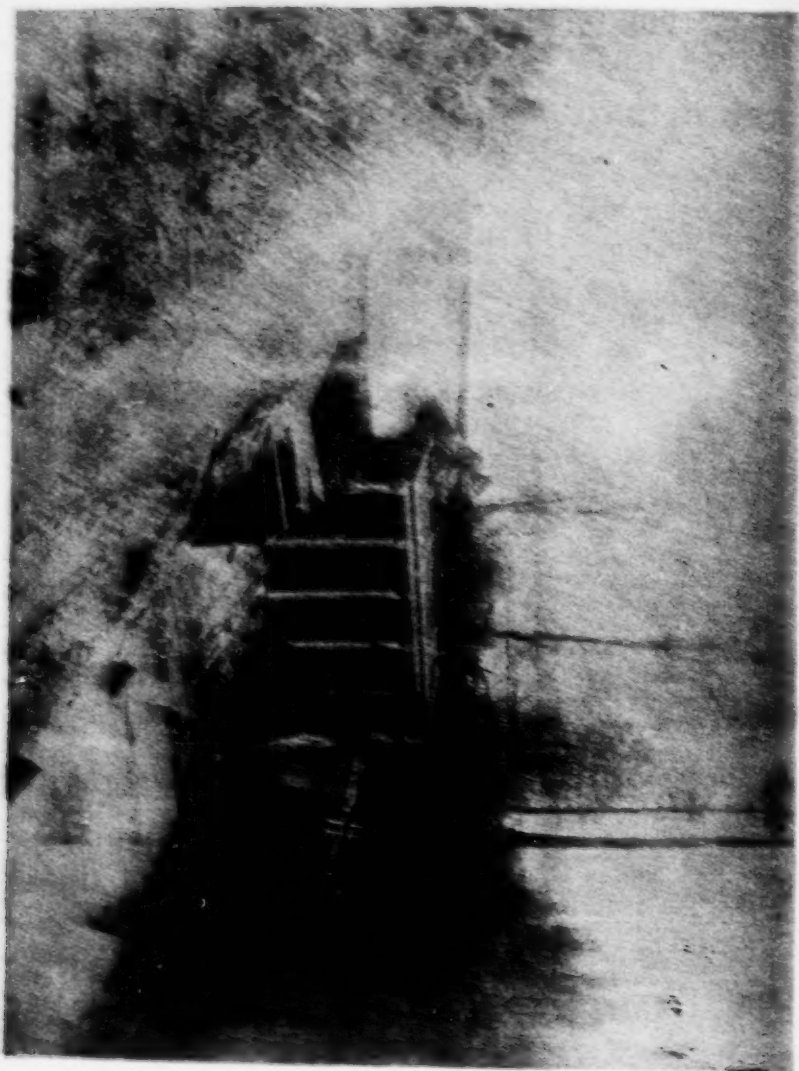
100 [Endorsed on back:] 4503. Water passing through the gates morning of 10/27. Filed in Superior Court, Thurston Co., Wash., Dec. 26, 1910. W. M. Nunn, clerk.



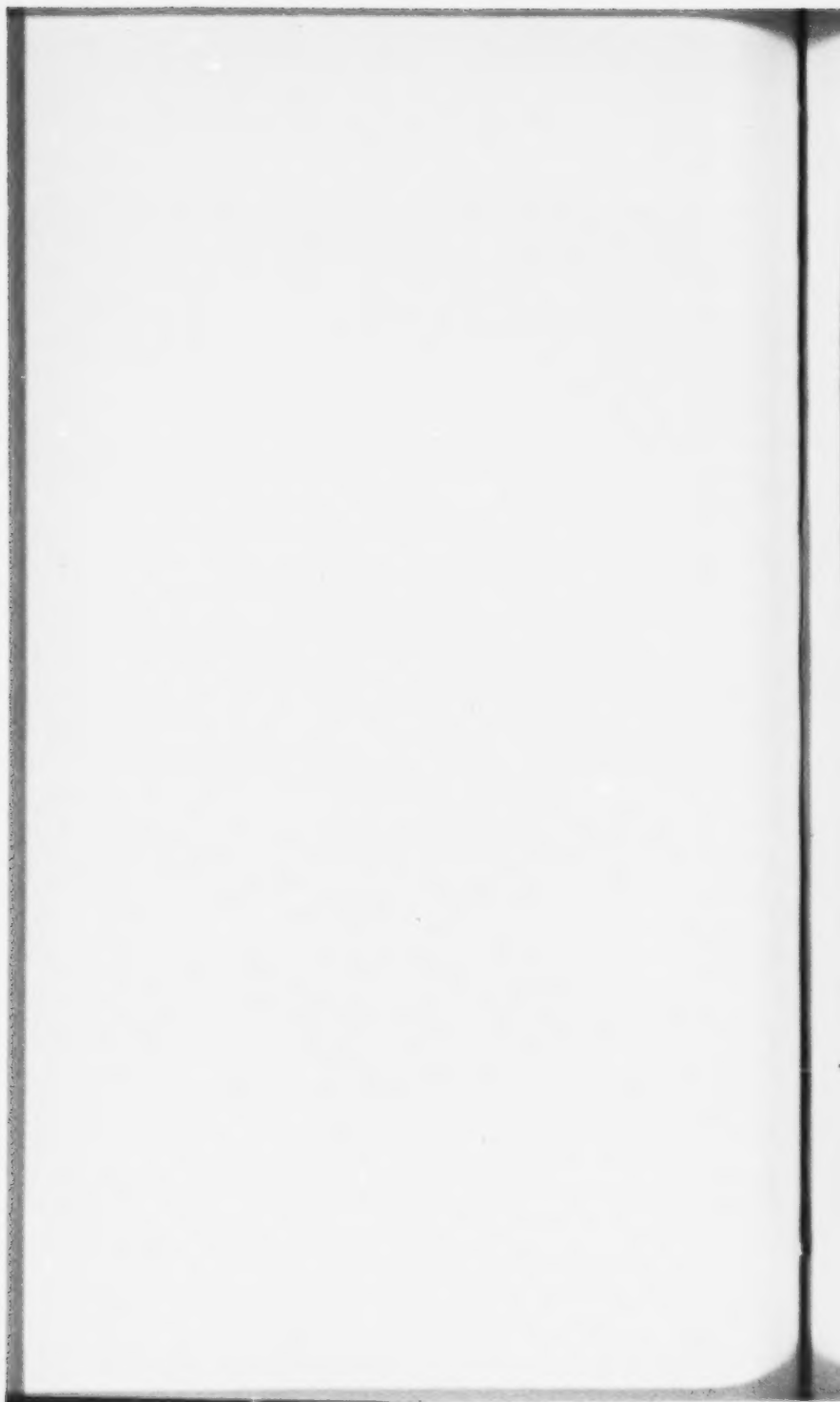


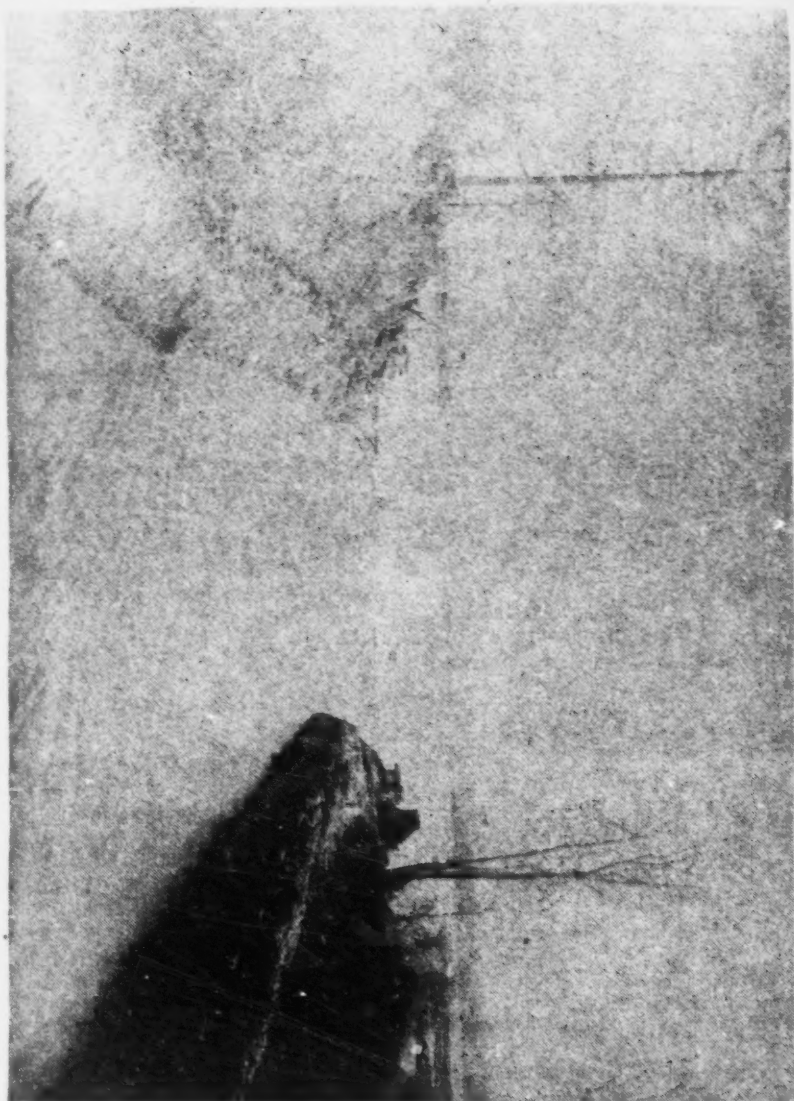
101 [Endorsed on back:] 4503. Wednesday, 10/26/10.
Front view, facing Lake Wash. Filed in Superior Court
Thurston Co., Wash., Dec. 29, 1910. W. M. Nunn, clerk.



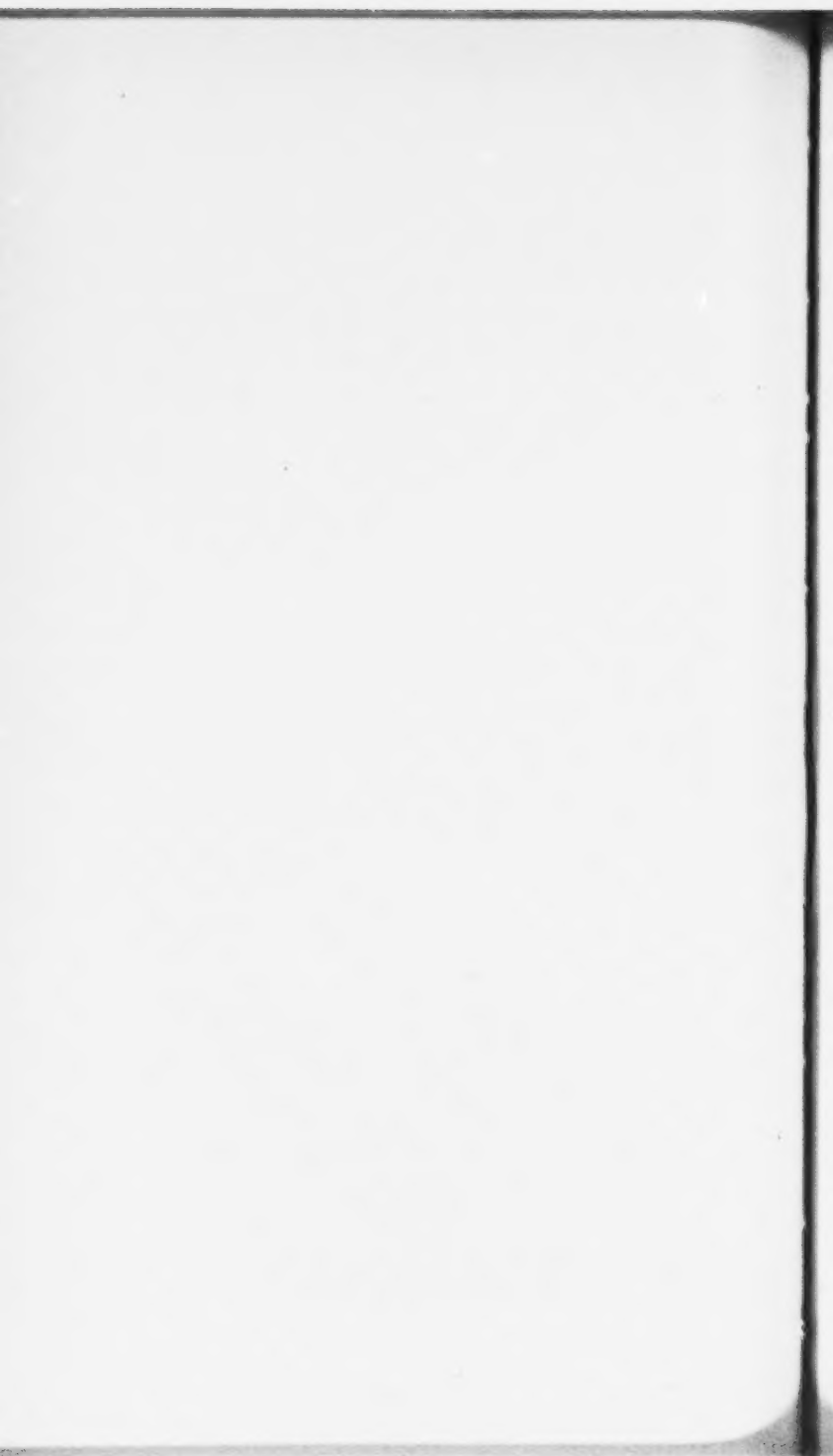


102 [Endorsed on back.] 4503 10/26/10. Gates installed in bottom of ditch by U. S. Eng'r. 1910, back view. Filed in Superior Court, Thurston Co., Wash., Dec. 29, 1910. W. M. Nunn, clerk.





103 [Endorsed on back:] 4593. Wednesday, 10/25/10, 4
p. m. Water coming into ditch after barrier blown out.
Filed in Superior Court, Thurston Co., Wash., Dec. 29, 1912. W. M.
Nunn, clerk.



104

DEPARTMENT ONE.

Filed Jan. 17, 1912.

No. 9761.

STATE OF WASHINGTON on the Relation of CHARLES P. CURTISS,
Respondent,

v.

C. J. ERICKSON and P. A. CARLSON, Appellants.

C. J. Erickson, a general contractor, had the contract for excavating a part of the Lake Washington canal. Carlson was a foreman who had charge of a part of the work. On October 22, 1910, the case of William L. Bilger et al. v. The State of Washington and C. J. Erickson, 21 Wash. Dec. 309, was pending in the superior court of Thurston county, and upon that day the matter coming on for hearing upon the application of the plaintiffs for an order enjoining defendants from removing the embankment between the excavated portion of the canal and Lake Washington the court, being satisfied that such removal might tend to lower the waters of the lake to the detriment and damage of the plaintiffs, announced that a restraining order would issue. On October 28, a formal order reciting the presence of the parties and the oral announcement of the court made on October 22, that it would grant unto plaintiffs the relief prayed for, was entered. In this order we find the following:

"And it having this day been brought to the attention of the court that since the announcement of the decision of this court in this cause, and on or about four o'clock p. m. of October 26, 1910, some person or persons, by the use of dynamite or other explosive, tore the bottom of the ditch of excavation so as to lower the bottom thereof below the surface of the waters of said Lake Washington, and thereby turn the waters of said lake into the ditch or canal, and that such condition will probably result in inflicting damage upon the plaintiffs sought to be prevented by the decree in this cause, and it having been suggested to the court that such act was committed by some of the defendants other than state of Washington and county of King, their servants, agents, employees or representatives. Now, therefore," etc., etc.

Thereafter these appellants were brought before the court under a rule to show cause why they should not be punished for disobedience of the order of the court.

A review of the evidence offered in support of the case of the appellants would serve no purpose. It is enough to say that
105 appellant Erickson disclaims all responsibility, saying that the contumacious act was done contrary to his advice and without his knowledge, and that it was done under the direction of the United States engineers who had charge of the work for the government, and appellant Carlson claims to have acted under the

direction of the same engineers and further that he had no knowledge of the court's order. Erickson, as well as his agents and servants, was bound to take notice of the announcement made by the court on October 22, and having the work in charge Erickson is to be held to a strict accountability, not only to keep his own conduct within bounds, but to see to it that his servants and agents did not violate any order of the court. If the rule were otherwise, it would be possible as it may have been in this case for the party defendant to step aside and, although seemingly protesting, make his men and means subject to the orders of a stranger to the proceeding, and thus defeat the will of the court.

We have not overlooked the contention of appellants that an order of the court is not effective until formally entered by the clerk, citing *State ex rel. Jensen v. Bell*, 34 Wash. 185; but that and other cases which might be cited all go to the time when the right of appeal or other right begins or ends, or where it is contended that the court has announced one decision and the judgment as entered by the clerk recites another. The rule has never, so far as we are informed, been entertained as a defense in a contempt case where there is no conflict or question as to the order of the court. An order of injunction is binding from the time the party is informed thereof and not as in the case of affirmative orders, from the time of service. *Rem. & Bal. Code*, § 729; 22 *Cyc.* 1013-14. If it were not so it would be possible always to defeat the order of the court by performing the prescribed act while the formal order of the court was in process of preparation. We are not disposed to question the order of the trial court in cases of this character, and will not do so unless the evidence is such as to convince us beyond doubt that the parties charged are not guilty of contumacious conduct, or it is plain that the law has not been violated. The court imposed a fine

of \$300 and imprisonment for sixty days upon appellant
106 Erickson, and a fine of \$100 upon appellant Carlson. This sentence is erroneous in so far as Erickson is concerned. The testimony shows that the waters of Lake Washington were not appreciably lowered by blasting out the embankment, and it does not appear that any right or remedy of Bilger and his co-plaintiffs was defeated or prejudiced. *Rem. & Bal. Code*, §1050. Under this section the court had no jurisdiction to assess a fine in excess of the sum of \$100.

The further point is made that, under the final decision of the Bilger suit, (21 Wash. Dec. 309,) no right of the plaintiffs in that case was interfered with, and hence the court had no jurisdiction to punish for contempt, as the loss of or interference with a right or remedy is only material, or to be considered, in fixing punishment. It is enough that the court was exercising jurisdiction to hear and determine the case then before it, and defendants were guilty of "disobedience of * * * a lawful order * * * of the court." The mere fact that this court held Bilger and his co-plaintiffs to be without present remedy does not rob the superior court of its power to enforce its orders issued *pendente lite*, in a case where it has jurisdiction of the parties as well as of the subject matter.

The judgment is affirmed as to the defendant Carlson, and the cause remanded with instructions to the lower court to assess a fine against Erickson not exceeding the sum of \$100.

CHADWICK, J.

We concur:

DUNBAR, C. J.

GOSE, J.

CROW, J.

PARKER, J.

107 In the Supreme Court of the State of Washington, Friday,
April 12, 1912.

In the Matter of the Petitions for Rehearing in the Following Cases:

Heim et al. vs. Elliott et al.,	No. 9813.	Order.
Shultice vs. Modern Woodman of America, etc.	" 9817.	"
Morgan v. Fidelity & Deposit Co. of Maryland.	" 9752	"
State v. Beebe	" 9597	"
Povelli v. Seattle Steel Co.	" 9418	"
State ex rel. Curtiss v. Erickson.	" 9761	"

The petitions for rehearing in the above named causes having been heretofore submitted to the court and the court having fully considered the same and being fully advised in the premises, It is ordered that the said petitions be and the same are hereby denied.

108 In the Supreme Court of the State of Washington, Monday,
April 15, 1912.

No. 9761.

STATE ex Rel. CHARLES P. CURTISS, Respondent,

vs.

C. J. ERICKSON & P. A. CARLSON, Appellants.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Thurston county and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises, it is now on this 15th day of April, A. D. 1912, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed as to P. A. Carlson and remanded with instructions to assess a fine against Erickson not exceeding the sum of \$100.00/100 and that the petition for rehearing be denied. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

109 In the Supreme Court of the State of Washington.

No. 9761.

STATE ex Rel. CHARLES P. CURTISS, Respondent,

VS.

C. J. ERICKSON and P. A. CARLSON, Appellants.

Petition of P. A. Carlson for Writ of Error.

To Honorable Ralph O. Dumbear, Chief Justice of the Supreme Court of the State of Washington:

The petition of P. A. Carlson respectfully shows:

That heretofore, to-wit, upon the 28th day of December, 1910, there was tried a cause in the superior court of Thurston county, state of Washington, in which the state of Washington on the relation of Charles P. Curtiss was plaintiff and C. J. Erickson and this petitioner were defendants. That said cause was instituted upon the affidavit of said Charles P. Curtiss to the effect that this petitioner had been guilty of a contempt of the said court in disobeying a decree of injunction which it was alleged had theretofore been rendered by said court forbidding as was alleged the said P. A. Carlson from further excavating the channel or canal between Lakes Washington and Union or lowering the waters of Lake Washington situate in King county, Washington.

That your petitioner in defense of said cause duly showed to the said court that he had performed the acts complained of while acting under the direct orders and supervision of officials of the war department of the United States of America acting in the performance of their duties in constructing a public improvement, to-wit, a ship canal extending from said Lake Washington to Salmon Bay in pursuance of and in accordance with statutes of the United States of America, and your petitioner then and there claimed that the said acts had been done under authority exercised under the
110 United States and claimed in immunity for said acts done under the statutes of the United States and the authority exercised under the United States as aforesaid, and also claimed on account of the facts as aforesaid, that the said court was without jurisdiction either to enter the decree which it was alleged your petitioner had disobeyed or to hold your petitioner guilty of contempt.

That in spite of the showing and claim of your petitioner made as aforesaid, the said court held him guilty of contempt of said decree in performing the acts aforesaid and entered a fine against your petitioner in the sum of one hundred dollars.

That thereafter your petitioner duly appealed from the judgment entering the said fine as aforesaid to the supreme court of the state of Washington that being the highest court of law or equity of the said state in which a decision could be had in said cause, duly assigning therein as error the act of the said superior court in entering

judgment against your petitioner despite the showing and claim made as aforesaid, but the said supreme court did on January 17, 1912, file its opinion and order wherein the judgment of the said superior court was affirmed as to your petitioner.

That thereafter to-wit, upon the 16th day of February, 1912, your petitioner duly filed in the said supreme court his petition for a rehearing of said cause before the entire court, wherein your petitioner again made the showing and claim as aforesaid, which said petition was on, to-wit, April 12, 1912, denied, and thereupon the said supreme court of the state of Washington rendered its final judgment thereon affirming the judgment of the said superior court in so far as the rights of your petitioner are concerned.

III Your petitioner further shows that your petitioner's co-appellant C. J. Erickson cannot join with him in petitioning for this writ of error for the reason that the said supreme court of the state of Washington by the same judgment wherein it affirmed the judgment of the lower court in so far as your petitioner is concerned reversed the said judgment of the lower court as to the said C. J. Erickson, and remanded the cause to the lower court for further proceedings in so far as the rights of the said C. J. Erickson are concerned, and no final judgment has yet been rendered as to the said C. J. Erickson.

Your petitioner further shows that the said judgment of the said supreme court was and is a final judgment as to your petitioner in the highest court of the state of Washington in which a decision in said suit could or can be had.

Your petitioner further shows that a federal question was made in said cause, to-wit, as hereinbefore set out, and that said judgment of the supreme court was repugnant to and in conflict with the laws of the United States, and that the said decision is and was against a right, privilege and immunity duly claimed under the statutes of the United States and was against an authority under the United States.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States be allowed in this behalf to the supreme court of the state of Washington for the correction of errors so complained of; that citation herein be granted and signed; that the bond herewith presented be approved; that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States, that said bond and writ of error may operate as a supersedeas during the pendency of the said writ of error, and that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said supreme court of the state of Washington be reversed.

P. A. CARLSON,
By SHANK & SMITH,
His Attorneys.

Indorsed. Filed May 2, 1912. C. S. Reinhart, Clerk.

112 In the Supreme Court of the State of Washington.

No. 9761.

STATE ex Rel. CHARLES P. CURTISS, Respondent,

v.

C. J. ERICKSON and P. A. *Curtiss*, Appellants.

Assignment of Errors.

Comes now the above named P. A. Carlson plaintiff in error herein and respectfully submits that in the record, proceedings, decision and final judgment of the supreme court of the state of Washington in the above entitled matter there is manifest error in this, to-wit:

First. The court erred in refusing to find as a fact that all the acts and doings in the performance of which it was charged that this plaintiff in error committed contempt of the superior court of Thurston county, state of Washington, were done under the direction and authorization of officials of the war department of the United States of America acting in the performance of their duties in constructing a public improvement, to-wit, a ship canal extending from Lake Washington to Salmon Bay in pursuance of and in accordance with statutes of the United States of America.

Second. The court erred in holding that the superior court of Thurston county, state of Washington, had jurisdiction to enter any decree tending to forbid or enjoin the prosecution of the said work.

Third. The court erred in holding that this plaintiff in error had been guilty of any contempt of the said superior court of Thurston county state of Washington.

Fourth. The court erred in confirming the judgment of the superior court of Thurston county state of Washington, in so far as this plaintiff in error is concerned.

113 Fifth. The court erred in refusing to reverse the judgment of the superior court of Thurston county, state of Washington, in so far as this plaintiff in error is concerned upon the ground that all the acts which the said superior court declared to be a contempt of its decree had been done under authority exercised under the United States in accordance with statutes of the United States.

Sixth. The court erred in refusing to this plaintiff in error an immunity for said acts under statutes of the United States and the authority exercised under the United States as aforesaid.

Seventh. The court erred in failing and refusing to hold that the claim and showing of this plaintiff in error that the said acts which were alleged as a contempt of court were done under the direct supervision and control of United States government officials acting pursuant to statutes of the United States, were complete defenses.

Eighth. The court erred in refusing to grant to this plaintiff in

error his petition for rehearing upon the grounds hereinabove set forth.

CORWIN S. SHANK,
WINFIELD R. SMITH,
Attorneys for Plaintiff in Error.

Indorsed: Filed May 2, 1912. C. S. Reinhart, Clerk.

114 In the Supreme Court of the State of Washington.

No. 9761.

STATE ex Rel. CHARLES P. CURTISS, Respondent,
v.
C. J. ERICKSON and P. A. CARLSON, Appellants.

Bond.

Know all men by these presents: That we P. A. Carlson as principal and W. G. Jones and C. J. Erickson as sureties are held and firmly bound unto the state of Washington on the relation of Charles P. Curtiss in the full and just sum of one thousand dollars (\$1000) to be paid to the said obligee, and its successors, for which payment well and truly to be made we bind ourselves, our heirs and personal representatives, jointly and severally by these presents.

Sealed with our seals and dated this 2nd day of May, 1912.

The condition of the foregoing obligation is such that

Whereas in the supreme court of the state of Washington in a suit depending in the said court between the said obligee as respondent and the said obligor, P. A. Carlson, as appellant, a judgment was entered against the said P. A. Carlson, and the said P. A. Carlson has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said obligee citing and admonishing it to be and appear before a session of the Supreme Court of the United States to be holden at the city of Washington on the 30th day of June next:

Now, the condition of the above obligation is such that if the said P. A. Carlson shall prosecute said writ of error to effect and answer all damage and costs if he fail to make the said plea good,

then the above obligation to be void, else to remain in full

115 force and virtue.

P. A. CARLSON.	[SEAL.]
C. J. ERICKSON.	[SEAL.]
W. G. JONES.	[SEAL.]

Approved by

R. O. DUNBAR,

*Chief Justice of the Supreme
Court of the State of Washington.*

STATE OF WASHINGTON,

County of King, ss:

W. G. Jones and C. J. Erickson being each duly sworn each for himself and not one for the other depose and say: I am a citizen and resident of King county, state of Washington, and am a freeholder therein; I am not an attorney or counselor at law, sheriff, clerk of the court, or other officer of the court; I am worth the sum of over \$1000 in property within the state of Washington, over and above all my just debts and liabilities exclusive of property exempt from execution.

C. J. ERICKSON,

W. G. JONES.

Subscribed and sworn to before me this 2nd day of May, 1912.

[SEAL]

CHARLES W. SHANK

*Notary Public & not for the
State of Washington Residing at Seattle.*

Indorsed: Filed May 2, 1912. C. S. Harburt Clerk

(74) In the Supreme Court of the State of Washington.

No. 9761.

-STATE OF THE CHURCH OF CHRIST, Reorganized-

C. J. ERICKSON and P. A. CARLSON, Defendants.

vs. The Church of Christ of Los Angeles

The above entitled matter came on for hearing upon the petition of the defendant P. A. Carlson, trustee of a trust of money from the Supreme Court of the United States, to the Supreme Court of the state of Washington, and upon representation of said petitioners and the respondent, said notice and demand giving the said petitioner an opportunity to present to the Supreme Court of the United States the questions presented for its consideration, and answer to the same.

Ordered that a writ of certiorari be hereby issued to this court from the Supreme Court of the United States.

Dated May 2nd 1912.

J. C. GUNNAR,

*Just. Justice of the Supreme Court
of the State of Washington.*

[ENDORSED] —

(17) UNITED STATES OF AMERICA, ss:

The President of the United States is the Honorable Justice of the Supreme Court of the United States, Washington, D. C.

Because in the present and proceedings as also in the condition of the petition of an action which is in the said Supreme Court of the

State of Washington before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the State of Washington on the relation of Charles P. Curtis, respondent and defendant in error, and C. J. Erickson, appellant, and P. A. Carlson, appellant and plaintiff in error, wherein was drawn in question an authority exercised under the United States and the decision was against that authority, and wherein was drawn in question the construction of a commission held under the United States and the decision was against the right, title, privilege and exemption especially set up and claimed under such commission, a manifest error hath happened to the great damages of the said P. A. Carlson, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
 118 with this writ, so that you may have the same at Washington on the first day of July, 1912, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable C. H. Hartford, United States District Judge, and the seal of said Court, this 3rd day of May, 1912.

[Seal of the United States District Court, Western District of Washington.]

A. W. ENGLE,

*Clerk of District Court for the Western
 District of Washington, Southern Division.*
 Per JAMES C. DRAKE,

Deputy

Allowed by

*Chief Justice of the Supreme Court
 of the State of Washington*

119 [Endorsed.] No. 9761. In the District Court of the United States for the Western District of Washington, Southern Division. P. A. Carlson, Plaintiff in error, vs. Chas. P. Curtis, Defendant in error. Writ of Error. Filed May 6, 1912. C. S. Reinhart, Clerk.

120 In the Supreme Court of the State of Washington.

No. 9761.

STATE ex Rel. CHARLES P. CURTISS, Respondent,
v.
C. J. ERICKSON and P. A. CARLSON, Appellants.

Citation.

UNITED STATES OF AMERICA, *vs.*

To the State of Washington on the Relation of Charles P. Curtiss,
Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the city of Washington thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the state of Washington wherein P. A. Carlson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said P. A. Carlson plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Ralph O. Dunbar, Chief Justice of the Supreme Court of the State of Washington, this 6th day of May, 1912.

R. O. DUNBAR,
*Chief Justice of the Supreme Court
of the State of Washington.*

121 Service of the within paper and of writ of error in said case is hereby admitted this 15th day of May, 1912.

THOMAS A. MEADE,
Attorney for Respondent.

[Endorsed:] No. 9761. In the Supreme Court of the State of Washington. State ex Rel. Charles P. Curtiss, Respondent, v. C. J. Erickson and P. A. Carlson, Appellants. Citation. Filed May 21, 1912. C. S. Reinhart, Clerk. Shanks & Smith, Attorneys for P. A. Carlson, Alaska Building, Seattle.

122 In the Supreme Court of the State of Washington.

No. 9761.

STATE ex Rel. CHARLES P. CURTISS, Respondent,

v.

C. J. ERICKSON and P. A. CURTISS, Appellants.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct copy of the record in the above entitled cause as the same now remains on file in my office; and I herewith transmit said transcript, together with the original Writ of Error and the Original Citation, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at Olympia, this 26th day of June, 1912.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,

*Clerk of the Supreme Court
of the State of Washington.*

Endorsed on cover: File No. 23,303. Washington Supreme Court. Term No. 728. P. A. Carlson, plaintiff in error, vs. The State of Washington on the relation of Charles P. Curtiss. Filed July 20th, 1912. File No. 23,303.



7
Office Supreme Court, U. S.
FILED.
SEP 2 1913
JAMES H. MCKENNEY,
CLERK.

BRIEF OF PLAINTIFF IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. ~~728~~ 307

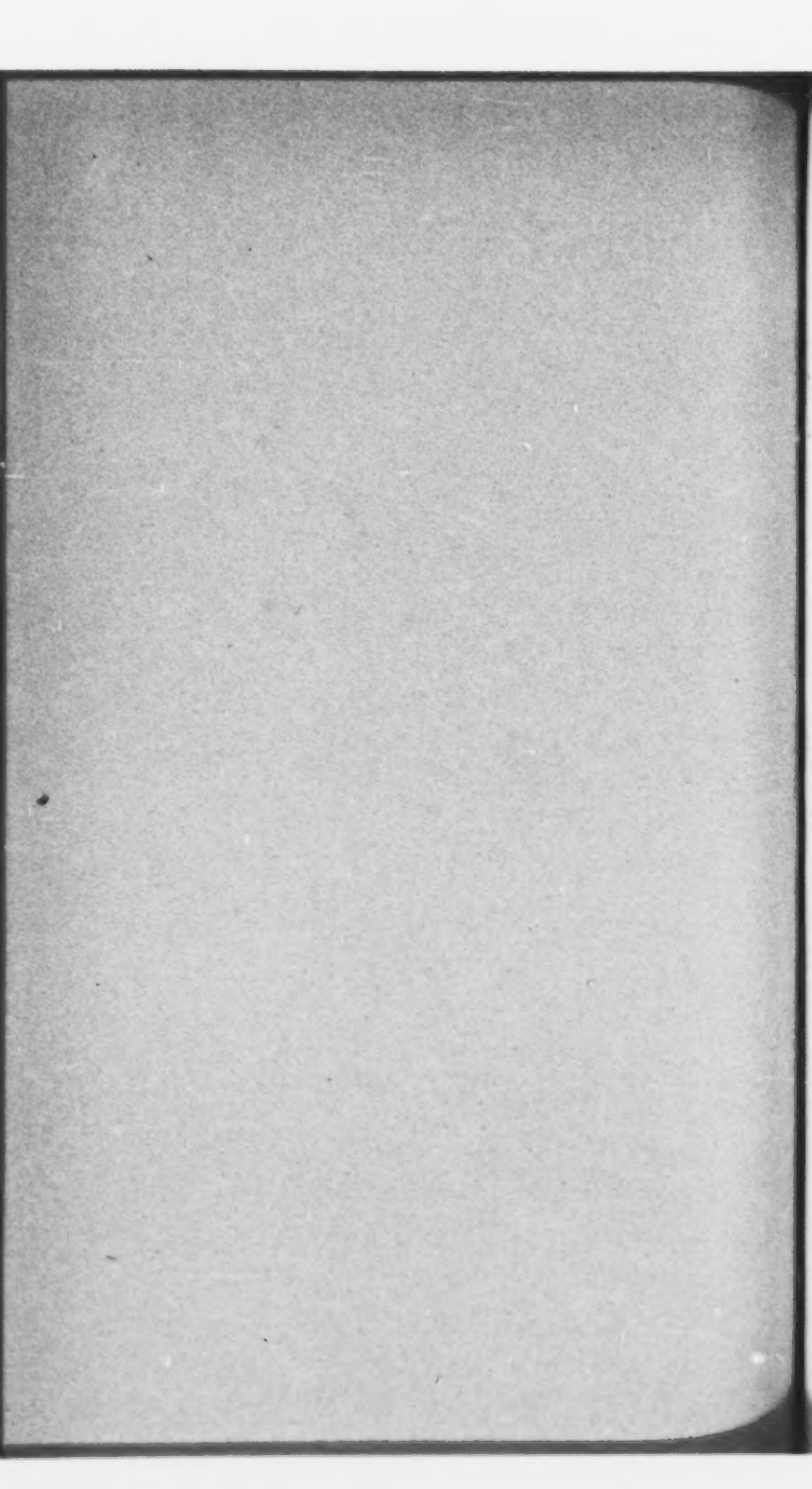
P. A. CARLSON, PLAINTIFF IN ERROR

vs.

THE STATE OF WASHINGTON ON THE RE-
LATION OF CHARLES P. CURTISS.

*In error to the Supreme Court of the State
of Washington.*

Washington Printing Co.



BRIEF OF PLAINTIFF IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 728

P. A. CARLSON, PLAINTIFF IN ERROR

vs.

THE STATE OF WASHINGTON ON THE RE-
LATION OF CHARLES P. CURTISS.

*In error to the Supreme Court of the State
of Washington.*

STATEMENT OF THE CASE

This case comes up on a writ of error to the supreme court of the state of Washington, upon a final judgment of that court affirming a judgment of the superior court of Thurston County, Washington, adjudging the plaintiff in error to be in con-

tempt of that superior court, and sentencing him to pay a fine.

The act which was adjudged to be a contempt of that court grew out of the following facts:

The United States of America is the owner of a canal right-of-way, connecting Lake Washington with Puget Sound, by way of Lake Union and Salmon Bay, and was in unquestioned possession of the same, through its officers.

On August 16th, 1910, a contract had been entered into between C. J. Erickson and Arthur Williams, "Captain, Corps of Engineers, United States Army, * * * representing the State of Washington," for doing certain excavation in the construction of this canal. This contract had been about completed when the superior court of Thurston County entered a decree enjoining the State of Washington, King County, C. J. Erickson, and each of them, their servants, officers, agents, employees and representatives, from proceeding further in excavating this canal.

The plaintiff in error was an employe of C. J. Erickson, and upon October 26, 1910, in accordance with orders given by United States officials in charge of the work, exploded a blast under the dam which held back the water of Lake Washington from running into the canal. This act was considered by the superior court contemptuous, and

the plaintiff in error and Mr. Erickson were cited to show cause why they should not be punished for contempt.

Among other defenses, this plaintiff in error showed to the court that he performed this act under authority of Federal officials acting in pursuance of laws passed by Congress, and claimed an immunity for doing such acts, raising this question both by demurrer, answer and his testimony in open court.

The superior court, however, found plaintiff in error guilty of contempt of court in the performance of said act, and sentenced him to pay a fine.

Upon appeal to the supreme court of the state of Washington, this plaintiff in error raised this question in his briefs and argument, but the judgment of the lower court was affirmed by the supreme court and a rehearing denied. The co-defendant of plaintiff in error, C. J. Erickson, does not join in this writ of error for the reason that as to him the judgment of the superior court was reversed and sent back to the superior court for further proceedings.

SPECIFICATIONS OF ERROR.

The plaintiff in error respectfully submits that the supreme court of the state of Washington erred in the following particulars:

First: The court erred in refusing to find as a fact that all the acts and doings in the performance of which it was charged that this plaintiff in error committed contempt of the superior court of Thurston county, state of Washington, were done under the direction and authorization of officials of the war department of the United States of America acting in the performance of their duties in constructing a public improvement, to-wit, a ship canal extending from Lake Washington to Salmon Bay, in pursuance of and in accordance with statutes of the United States of America.

Second: The court erred in holding that the superior court of Thurston county, state of Washington, had jurisdiction to enter any decree tending to forbid or enjoin the prosecution of the said work.

Third: The court erred in holding that this plaintiff in error had been guilty of any contempt of the said superior court of Thurston county, state of Washington.

Fourth: The court erred in confirming the judgment of the superior court of Thurston county, state of Washington, in so far as this plaintiff in error is concerned.

Fifth: The court erred in refusing to reverse the judgment of the superior court of Thurston county, state of Washington, in so far as this plaintiff in error is concerned upon the ground that all

the acts which the said superior court declared to be a contempt of its decree had been done under authority exercised under the United States in accordance with statutes of the United States.

Sixth: The court erred in refusing to this plaintiff in error an immunity for said acts under statutes of the United States and the authority exercised under the United States aforesaid.

Seventh: The court erred in failing and refusing to hold that the claim and showing of this plaintiff in error that the said acts which were alleged as a contempt of court were done under the direct supervision and control of United States government officials acting pursuant to statutes of the United States, were complete defenses.

Eighth: The court erred in refusing to grant to this plaintiff in error his petition for rehearing upon the grounds hereinabove set forth.

ARGUMENT.

Inasmuch as all of the assignments of error apply to the merits of this case, the plaintiff in error will take the assignments up and discuss them together, under the one claim that the act which the state courts held to be in contempt was done in obedience to Federal officials acting under authority of acts of Congress in carrying out a public improvement authorized by acts of Congress, and that

no court had jurisdiction to enjoin such an act, as such an injunction was in effect an injunction directed to the United States.

The blowing out of this embankment was an act done by authority exercised under the laws of the United States. The canal right-of-way was at this time in control of the Federal War Department (tr. pp. 44 and 45). The legislature of the state of Washington had prior to this time granted to the United States of America the right to carry on this improvement, by statute reading as follows:

"In aid of the construction, maintenance and operation of a ship canal by the United States of America, to connect the waters of Lake Union and Lake Washington, in King County with Puget Sound, together with all necessary and convenient locks, landways, spillways, buildings, power plants, and other proper appurtenances, there be and hereby is granted by this state to said United States the right to place, construct, maintain and operate such ship canal, landways, spillways, buildings, power plants and other proper appurtenances, upon, along, through, and over any and all lands belonging to and the waters of this state in said King County, within such limits as shall be defined by the plans and specifications for such improvement, as the same shall be approved by the United States Secretary of War, and the right to raise the waters of Salmon Bay and the right to lower the waters of Lake Washington in prosecution of such improvement." 1901 Session Laws, of Washington, page 7.

The Second Session of the 61st Congress had authorized this improvement by including in its appropriation bill the following:

"Puget Sound-Lake Washington Waterway: Continuing improvement by the construction of a double lock with the necessary accessory works, to be located at "The Narrows" at entrance to Salmon Bay, in accordance with the project set forth in House document numbered 953, 60th Congress, 1st Session, \$150,000.00; and the Secretary of War may enter into a contract, or contracts, for such material and work as may be necessary to complete said lock and accessory works, to be paid for as funds may be provided from time to time by law, not to exceed in the aggregate \$2,275,000.00 including the amount herein appropriated: Provided, that before beginning said work, or making such contract, or contracts, the Secretary of War shall be satisfied that King County, or some other local agency, will do the excavation in the waterway above the lock to the dimensions recommended in said project, and will also secure the United States from liability for any claims or damages on account of the grant made to James A. Moore, or his assigns, by act of Congress approved June 11, 1906, or account of the lowering of the level of Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway."

36 Statutes at Large, 666.

The supreme court of this state, in construing this situation, in the opinion upon the appeal from the judgment of the superior court which this plaintiff in error is held to have disobeyed, held the following as to the rights of the government, the state, and the private individuals interested:

"By § 1 of article 17 of the state constitution, the state asserted its ownership of the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters



where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. This title, we have frequently held, is title in fee, free from encumbrances and easements of any kind, and hence, free from claim of the upland owner to riparian and littoral rights (citing cases). It follows, therefore, that such littoral and riparian rights as the respondents have in the waters of Lake Washington were acquired by them in virtue of the purchase of the shore lands made by them from the state of Washington. By a reference to the dates above given, it will be observed that the respondents acquired these shore lands on December 4, 1903, a time subsequent to the grant made by the state to the United States in 1901, conferring upon the United States the right to lower the waters of the lake. Since the respondents' title is subsequent thereto, it is necessarily subject thereto, and if the grant to the United States be valid, the respondents have no rights of property that can be affected by the lowering of the waters of the lake. The state, like any other individual owner of property may convey its property in any manner that it deems fit. It may grant an easement therein to one party and the remaining interest therein to another. But it can make but one valid grant of the same property, hence, as we say, if it has granted to the United States the right to lower the waters of Lake Washington, it could not subsequently grant to the respondents by a mere deed to its shore land bordering on the lake, the right to estop the United States from exercising the privilege granted." *Bilger v. State*, 63 Washington, 457, 464, 465.

Further on in this opinion, the supreme court uses the following language regarding this work:

"It is said further that the grant is made to the United States, that the canal is being dredged by the state of Washington and King county, and that

there is no privity of contract or of relation shown to exist between the United States and the state and county. But while it is true that the actual work of dredging the canal between Lakes Washington and Union is being done by the state and county of King, it is also true that they are doing the work on behalf of the United States. The record, as we have shown, discloses that the government has required King county or some other local agency to dredge the canal from a point above the locks to Lake Washington, and that it was in compliance with this requirement that this particular work was undertaken. But the work is nevertheless the work of the government of the United States, and the canal when completed will be the property of that government, and owned, controlled, and operated by it." *Bilger v. State*, 63 Wash. 457, 466.

The order to do the act which was held to be contemptuous came through W. G. Jones, who received the order from Captain Williams, who had made the contract with Mr. Erickson. (See tr. p. 51); and Mr. Barrows, engineer in charge for the government, together with Hans Bastion, United States watchman, were personally present when the act was performed. (Tr. p. 31).

The injunction which the plaintiff in error disobeyed, was in effect an order to tie the hands of the United States government, and was therefore entirely beyond the jurisdiction of the court which granted it. The plaintiff in error had absolutely no interest in this matter whatever. So far as he personally was concerned, it made not the slightest difference whether this embankment was blown out or

not. The United States was the real party in interest in this controversy. The act was performed upon the property belonging to the United States, in accordance with the directions of officers of the United States, duly authorized to act. The plaintiff in error became a party to this proceeding solely by reason of his participation in the carrying out of this Federal improvement.

The government can only act through individuals, and if a court has jurisdiction to restrain one workman from participation in a Federal improvement, it can have jurisdiction to restrain all workmen from such participation, and the Federal improvement lawfully authorized by Congress might thereby be delayed and possibly entirely prevented, by an action brought in a state court.

It is quite significant that no case exactly like this has ever been brought to the attention of this court—so far as we have been able to discover. This court has, however, on two occasions decided that it is entirely beyond the jurisdiction of a court to enjoin a Federal official from using any patented article in the course of his duties as such official.

Belknap v. Schild, 161 U. S. 10. *International Postal Supply Co. v. Bruce*, 194 U. S. 601.

In each of these cases an injunction was sought against a Federal official, to prevent him from using in the course of his duties as such official an article

which the complainant declared infringed his patent. In the case first above cited, this court, through Mr. Justice Gray, used the following language:

“In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party against whom alone in fact the relief was asked, and against whom the decree would effectively operate. The plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court.”

This court has also held that a person lawfully acting by Federal authority was not amenable to criminal prosecution in a state court for such action. *Cunningham v. Neagle*, 135 U. S. 1; *Ohio v. Thomas*, 173 U. S. 276.

In *Boske v. Comingore*, 177 U. S. 459, this court held that a collector of Internal Revenue could not be held to be in contempt of a state court for refusing to produce in the state court records of his office which he was forbidden so to produce by the regulations of the department.

This court has also decided that a suit would not lie even in this court against officers of the United States where the adjudication would bind the hands of such officers in the performance of their official duties. *Minnesota v. Hitchcock*, 185 U. S. 373; *Oregon v. Hitchcock* 202 U. S. 60.

Similar cases to this have been up in the lower Federal courts, on various occasions, and the decisions have invariably been against the power of the state court to interfere with Federal duties by injunctions.

Campbell v. Waite, 88 Fed. 102; *In re Weeks*, 82 Fed. 729; *Stegall v. Thurman*, 175 Fed. 813; *U. S. v. Lipsett*, 156 Fed. 65; *In re Turner*, 119 Fed. 231.

In the *Turner* case, *supra*, a state court had enjoined an officer of the United States Army from

constructing a sewer. The U. S. District Court, however, discharged the officer upon writ of *habeas corpus*, saying in the opinion:

“If the court had jurisdiction, then the power to issue the writ existed, and whether it was issued upon a sufficient or insufficient showing by the landowner, is not a question for this court. But the question, and the only question for this court is, did the state court have jurisdiction to proceed further when it became known that Mr. Turner was Major Turner, and that Major Turner was doing the things complained of as an army officer in obedience to a command by the Secretary of War, pursuant to an act of Congress? If there is doubt about the matter, neither of these courts should hold that the state court was without power or jurisdiction, but having no doubt whatever that the state court was without jurisdiction, it is my duty to so order, and the state court being without jurisdiction, its writ of injunction was void, and the disobedience thereof was not a contempt and his arrest and detention was without authority.”

It may be argued that the cases above cited are all cases wherein the courts sought to influence the action of superior officers of the United States, and that a mere workman cannot come under the same protection. But the rulings in these cases are not made for the benefit of the officers. They are made for the benefit of the public at large, and the Federal government, in carrying on its business. It would most certainly be a peculiar ruling of law which should hold that it would be beyond the jurisdiction of the state court to enjoin Captain Wil-

liams from excavating this canal, and yet the state court could by enjoining the workmen make it necessary that if the canal is ever excavated Captain Williams should do it himself. Such a ruling would of course have the effect of leaving it within the power of the state court to prevent the excavation of this canal.

We respectfully submit that the injunction of the honorable superior court was in effect an injunction directed against the United States, and was therefore absolutely void; that it was entirely beyond the jurisdiction of that court to punish the plaintiff in error for disobeying its command in the premises; and that therefore the judgment of the state court should be reversed, with instructions to dismiss the proceeding.

Respectfully submitted,

CORWIN S. SHANK,

Attorney for Plaintiff in Error.....

CARLSON *v.* STATE OF WASHINGTON, ON THE
RELATION OF CURTISS.

ERROR TO THE SUPREME COURT OF THE STATE OF
WASHINGTON.

No. 307. Submitted March 17, 1914.—Decided May 25, 1914.

Although plaintiff in error, after setting up a Federal defense in the trial court, may not have based any exceptions upon the failure of that court to recognize it, if the appellate court did recognize, and by its decision necessarily overruled, that defense, this court must deal with the Federal question. *North Carolina R. R. v. Zachary*, 232 U. S. 248.

While, in ordinary cases, this court is bound by the findings of the state court of last resort, that court cannot, by omitting to pass upon basic questions of fact, deprive a litigant of the benefit of a Federal right properly asserted; and it is the duty of this court, in the absence of adequate findings, to examine the record in order to determine whether there is evidence which furnishes a basis for such a Federal right. *Southern Pacific Co. v. Schuyler*, 227 U. S. 601.

After reviewing the congressional and state legislation in regard to the construction of the Lake Washington Waterway, *held* that Congress has refrained from authorizing any work on behalf of the Federal Government with reference to lowering the level of Lake Washington, and that all responsibility in that respect was assumed by the State and county; and, notwithstanding the contract was made by

an officer of the United States Army, it was not on behalf of the United States, but as representing the State of Washington.

Under the acts of Congress relative to the Lake Washington Waterway, no agency of the Federal Government could have arisen prior to the action involved in this case with respect to anything done in connection with the construction of the canal.

Orders given by an officer of the United States in connection with work not authorized by any act of Congress will not justify one violating the injunction of a state court as doing the act under the direction of officers of the United States in charge of Government work.

The fact that title to right of way for a canal has vested in the United States and after completion the Secretary of War is to take charge of the canal, does not make the United States responsible, prior to completion, where Congress has expressly declared that the canal will only be accepted after completion, and that the local authorities shall meanwhile assume all responsibility in connection therewith.

66 Washington, 639, affirmed.

THE facts, which involve a review of the legislation, state and Federal, in regard to the construction of the Lake Washington Waterway to Puget Sound, and the extent of the responsibility of the Federal Government therefor, are stated in the opinion.

Mr. Corwin S. Shank for plaintiff in error.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error was adjudged by the Superior Court of Thurston County, in the State of Washington, to be in contempt of that court, in that, with notice of a decree made by it restraining and enjoining any further excavation of the Lake Washington Canal, or any lowering of the waters of Lake Washington, he proceeded to blow out an embankment at the head of the canal, which until that

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time held the waters of the lake at their natural level, so as to permit these waters to flow into the canal and thereby lower the level of the lake. The Supreme Court of the State affirmed the judgment (66 Washington, 639), and the case comes here under § 237, Jud. Code, upon the ground that the acts done by plaintiff in error, and because of which he was held to be in contempt of court, were done under the direction and authorization of officers of the War Department of the United States, acting in the performance of their duties in constructing a public improvement consisting of a ship canal extending from Lake Washington to Salmon Bay, in pursuance of statutes of the United States.

Our examination of the Federal question is somewhat embarrassed because the findings and statements of fact by the state courts contain no finding respecting some of the facts that are alleged as the basis of the present contention of plaintiff in error. The inadequacy is attributable, no doubt, to the mode in which the alleged Federal right was asserted. Plaintiff in error having been brought before the trial court upon an order to show cause, based upon a sworn complaint or information made by the relator setting forth circumstantially the blowing out of the embankment in question by one Erickson and by plaintiff in error as his foreman, the latter in his answer denied that he blew out the embankment upon the orders of Erickson, and on the contrary averred that he "did so by express orders of the engineering department of the United States Government." There was testimony tending to support this averment, but the trial court, while making no specific finding upon the subject, in effect held that the work was done in behalf of the State of Washington, one of the parties to the cause in which the restraining decree was made. To its findings numerous exceptions were taken, but in none of these was any Federal right asserted, nor was any deficiency in the findings suggested. The Su-

preme Court, however, instead of disregarding the claim of Federal right upon the ground that it had been abandoned in the trial court, recognized the contention of plaintiff in error that the "work was done under the direction of the United States engineers who had charge of the work for the Government," and by its decision necessarily overruled it. We must, therefore, deal with the Federal question. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 257.

Among the assignments of error is one based upon the refusal of the Supreme Court to find as a fact that the acts for the performance of which plaintiff in error was held guilty of contempt were done under the direction and authorization of officials of the War Department of the United States, acting in pursuance of and in accordance with the acts of Congress. While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right. *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611, and cases cited.

Since the present record appears to contain all the evidence that was submitted to the state courts, we proceed to supplement the statement made by the Supreme Court by adding such further facts pertaining to the asserted

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claim of Federal right as might reasonably have been found, with the following result:

One Erickson, a general contractor, had entered into a contract for excavating a part of the Lake Washington Canal. The contract was in writing, dated August 16, 1910, and was made between "Arthur Williams, Captain Corps Engineers, United States Army, hereinafter represented as the contracting officer representing the State of Washington, on the one part, and C. J. Erickson, of Seattle, in the County of King, State of Washington, hereinafter designated as the contractor, of the second part." The work covered by the contract was nearing completion when, on October 22, 1910, in an action pending in the Superior Court in and for the County of Thurston, between William L. Bilger and others, plaintiffs, and the State of Washington, King County, and Erickson, defendants, upon the application of the plaintiffs for an order enjoining defendants from removing the embankment between the excavated portion of the canal and Lake Washington, the court, being satisfied that such removal might tend to lower the waters of the lake to the detriment and damage of the plaintiffs, announced that a restraining order would issue. In accordance with this announcement a formal decree was made under date October 28. Erickson had notice of the announced decree, and plaintiff in error, who was acting as his foreman upon the work, had written notice of it on October 26, after which he proceeded to blow up the embankment, contrary to the prohibition. Under the state practice, the decree bound them from the time they were informed of it, although it was not yet formally entered. There was evidence tending to show that plaintiff in error acted under orders coming not from Erickson, but from Captain Williams; and his own testimony was to this effect. Other evidence tended to show that the canal strip or right of way was in the control of the War Department, with a watchman actually upon

the ground. The contract was not introduced in evidence, and there was only meagre testimony as to its contents, which left it doubtful whether the final work of excavating the opening between the head of the canal and the lake was within its provisions. Since there is no distinct finding upon this subject, we will consider the case in both aspects.

The act of Congress especially invoked as authority for what was done by plaintiff in error under direction of Captain Williams, is the River and Harbor Act of June 25, 1910 (36 Stat. 630, 666, c. 382), which contains the following:

"Puget Sound—Lake Washington waterway: Continuing improvement by the construction of a double lock, with the necessary accessory works, to be located at 'The Narrows,' at the entrance to Salmon Bay, in accordance with the project set forth in House Document Numbered Nine hundred and fifty-three, Sixtieth Congress, first session, one hundred and fifty thousand dollars; and the Secretary of War may enter into a contract or contracts for such material and work as may be necessary to complete said lock and accessory works, to be paid for as funds may be provided from time to time by law, not to exceed in the aggregate two million two hundred and seventy-five thousand dollars, including the amount herein appropriated: *Provided*, That before beginning said work, or making such contract or contracts, the Secretary of War shall be satisfied that King County, or some other local agency, will do the excavation in the waterway above the lock to the dimensions recommended in said project, and will also secure the United States from liability for any claims or damages on account of the grant made to James A. Moore or his assigns by the Act of Congress approved June eleventh, nineteen hundred and six, or on account of the lowering of the level of Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway."

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In order to correctly appreciate the meaning and effect of this language, it is necessary to refer to House Document No. 953, 60th Cong., 1st Sess. (Vol. 20), and to certain previous acts of Congress therein mentioned; and while reviewing these acts we may at the same time consider whether any of them contains any justification of what was done by plaintiff in error.

By way of preface, it should be stated that the city of Seattle lies between the tidal waters of Puget Sound and Lake Washington, the latter being a body of fresh water two miles or more in width and nineteen miles or more in length, and having a natural level 30 feet or more above mean low water in the Sound. Between this lake and the Sound is Lake Union, a smaller body of fresh water (covering about 1,000 acres), and having a natural level much lower than that of Lake Washington, yet considerably above the tide. The lakes had independent natural outlets. Salmon Bay is a small body of water connected through Shilshole Bay with Puget Sound, and is (or was) affected by the ebb and flow of the tide. The outlet of Salmon Bay is known as "The Narrows." Salmon Bay and Lake Union are wholly within the exterior limits of Seattle, and the city has also a considerable frontage on Lake Washington. This lake, as well as the city, lies within the limits of King County.

As early as the year 1890, September 19, 1890, 26 Stat. 426, 452, c. 907, Congress authorized a survey and estimate to be made for a ship-canal to connect the waters of these lakes with Puget Sound. A survey and report were made accordingly, but nothing resulted until 1894, August 18, 1894, 28 Stat. 338, 360, c. 299, when Congress appropriated \$25,000 for dredging Salmon Bay, and the improvement of the waterway connecting its waters with the lakes, but with a proviso that no part of the money should be expended upon the improvement of the connecting waterway until the entire right of way and a release

from all liability to adjacent property owners had been secured to the United States free of cost and to the satisfaction of the Secretary of War. By act of March 2, 1895, 28 Stat. 910, 948, c. 189, \$5,000 of this amount was authorized to be expended in making a definite survey and location of the improvement and in preparing a cadastral map showing each property required to be deeded to the United States or from which a release was required. The act of June 3, 1896, 29 Stat. 202, 234, c. 314, appropriated \$150,000, again with the proviso that no part of it should be expended on the improvement of the waterway connecting the Sound with the lakes until the entire right of way and a release from all liability to adjacent property owners had been secured to the United States; and with the further declaration that the canal might be constructed either by the Smith's Cove route or by the Shilshole Bay route, in the discretion of the Secretary of War.

In 1898 a Board of Engineer Officers was appointed to determine the choice, and recommended the Shilshole Bay route, with a lock at the Narrows near the foot of Salmon Bay. This recommendation was approved by the Secretary of War April 14, 1899, and right of way proceedings were completed and deeds obtained and accepted by the Secretary of War in 1900.

The legislature of Washington, by act approved February 8, 1901, Sess. Laws, p. 7, granted to the United States the right to construct and operate the ship canal upon any lands belonging to and waters of the State in King County, within limits to be defined by the plans and specifications for the improvement as approved by the Secretary of War, with the right to raise the waters of Salmon Bay and to lower the waters of Lake Washington in the prosecution of the improvement.

Congress was still unwilling to sanction any particular project for the canal, and by act of June 13, 1902, 32 Stat. 331, 347, c. 1079, while an appropriation of \$160,000 was

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made under the usual designation for "Improving waterway connecting Puget Sound with Lakes Union and Washington," it was provided that this sum, together with the unexpended balance to the credit of the improvement, should be expended in dredging a low-water channel 10 feet in depth from Shilshole Bay through Salmon Bay to the wharves at Ballard (at the head of the Bay); with a further proviso that a board of engineers should be appointed by the Secretary of War to make surveys, examinations, and investigations to determine the feasibility and advisability of constructing a canal with necessary locks and dams, connecting Puget Sound with the lakes, of sufficient width and depth to accommodate the largest commercial and naval vessels, to examine the route for a similar canal connecting Elliott Bay with the lakes, and to report upon the relative advantages of all proposed routes; and it was declared that "Nothing herein shall be construed as the adoption of any project for the construction of a waterway connecting Puget Sound with Lakes Union and Washington." The Board reported, January 6, 1903, that a canal sufficient to accommodate the largest commercial and naval vessels was feasible, but not advisable, chiefly because of the great cost, estimated at over \$8,000,000.

The act of March 3, 1905, 33 Stat. 1117, 1144, c. 1482, made a further appropriation of \$125,000, limited to dredging the channel to Ballard.

Meanwhile, it appears, the people of Seattle had become discouraged about the prospect of obtaining Government aid, and therefore accepted the proposition of one James A. Moore to build upon the Government right of way a canal with a suitable timber lock, if the County of King would contribute \$500,000 toward it; and an act of Congress of June 11, 1906, 34 Stat. 231, c. 3072, was secured, authorizing him to proceed with this work, subject to such conditions and stipulations as should be imposed by the

Chief of Engineers and the Secretary of War for the protection of navigation and the property and other interests of the United States, to include provision for the discharge of waters from Lakes Union and Washington, and afford adequate protection against claims for damages for changing the level of Lake Washington, and subject to provisos which required that plans and specifications should be approved by the Secretary of War, that Moore and his assigns should be liable for any damage occasioned by the construction of the lock and canal by overflow, by a lowering of the waters affected, or otherwise, and that the canal and lock when completed should be turned over to the United States ready for use and free of all expense.

The Moore plan included a timber lock between the lakes, and seems to have contemplated another lock to be constructed by the Government at the mouth of Salmon Bay. Shortly after the passage of the act just mentioned King County pledged its credit to the extent of \$500,000 in aid of the Moore project. A little later, however, the local interests inaugurated a movement for the installation of a permanent masonry lock in place of the timber lock, and legislative authorization was procured (act of March 18, 1907, Sess. Laws, p. 582), for the establishment of an assessment district in order to impose upon the shore lands benefited a part of the cost of the improvement. The same legislature supplemented the act of 1901 by a specific grant of a right of way over state lands between the lakes (act of March 16, 1907, Sess. Laws, p. 498).

About the same time Congress was again appealed to, and by act of March 2, 1907, 34 Stat. 1073, 1108, c. 2509, the Secretary of War was authorized to "make a survey and estimate of cost of said waterway or canal with one lock, with a view to the construction of the same, in conjunction with the county authorities of King County or other agency, of sufficient size to accommodate the largest commercial or naval vessels afloat; or, if deemed more

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advisable, with a view to the construction of a canal of less dimensions, and to submit dimensions and estimate of cost of same, together with a report upon what portion of said work will be done or contribution to be made by said county or other agency." And the provisions of the act of June 11, 1906, were thereby so modified as to permit Moore or his assigns to excavate a channel from deep water in Puget Sound at the mouth of Salmon Bay to deep water in Lake Washington, in lieu of constructing the canal and timber lock specified in that act. In June, 1907, Moore assigned his rights to a corporation created for the purpose of taking them over and coöperating with the assessment district in carrying out the work proposed to be done by local agencies; and it appears that some preliminary work was done upon the ground. By act of Congress of February 6, 1909 (35 Stat. 613, c. 83), the time allowed to Moore or his assigns for completion of the canal was extended until June 11, 1912.

In view of the history of the matter, the phrase "waterway or canal with one lock" in the act of 1907 evidently indicated a lock at The Narrows, and a continuous waterway thence to Lake Washington; and so it was construed. Pursuant to the authorization of Congress, an elaborate report of a survey and estimate of the cost of the proposed waterway was made by Major Chittenden, of the Engineer Corps, under date December 2, 1907, and submitted with the approval of the Division Engineer to the Chief of Engineers at Washington. It was reviewed by the Board of Engineers for Rivers and Harbors, and approved by them under date March 30, 1908, transmitted by the Chief of Engineers, with his approval, to the Secretary of War, and by the Acting Secretary transmitted to Congress under date May 20, 1908. It is this report and the accompanying documents which constitute House Doc. No. 953, 60th Congress, 1st Sess., Vol. 20, referred to in the act of June 25, 1910, 36 Stat. 630, 666, c. 382, above quoted.

The project as thus submitted contemplated the construction of a double lock, to be located at The Narrows at the entrance to Salmon Bay, and an unbroken waterway through Salmon Bay and Lakes Union and Washington, the differences in level to be overcome by raising Salmon Bay and lowering Lake Washington approximately to the level of Lake Union. With reference to that part of the act of 1907 requiring report to be made as to what portion of the work would be done or contribution made by King County or other agency, the recommendation was that in lieu of a cash contribution the local interests should be asked to do a specific portion of the work. Major Chittenden proposed that the Government should build the lock, and that the local agency should excavate the canal. His recommendation to this effect was concurred in by the Division Engineer and by the Board of Engineers for Rivers and Harbors, and the Board further recommended—"That the undertaking of the project by the United States be made contingent upon the furnishing to the Secretary of War of satisfactory evidence—First. That King County or other local agency will do the excavation in the waterway above the lock to the dimensions recommended. Second. That the said King County or other local agency will hold the United States free from any claims or damages on account of the grant made to James A. Moore or his assigns on account of the act of June 11, 1906. Third. That the said King County or other local agency will hold the United States free against any claims or damages on account of lowering the level of Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway."

As will appear by reference to the act of 1910, these recommendations were approved and adopted by Congress as a part of the project, and the appropriation, as well as the authorization of the contract, was confined to the construction of a double lock at the Narrows. From the fore-

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going review, it becomes evident that prior to this act all that was done by authority of Congress on the part of the Federal Government (aside from surveys and estimates and the acceptance of a conveyance of lands for the right of way of the canal), consisted of dredging work in Salmon Bay; and that the first construction work authorized in aid of the ship canal proper was that provided by the act of 1910, and was limited to the construction by the Government of a lock at the Narrows. It is further evident that at all times, and notably in the act of 1910, Congress has scrupulously refrained from authorizing anything to be done on the part of the Federal Government with reference to lowering the level of Lake Washington, raising the level of Salmon Bay, or otherwise altering the level of any part of the waterway, and that by the act of 1910 it was expressly provided that all responsibility for this should be assumed by King County or some other local agency.

Now, the *Bilger* suit, as appears by the decree therein already mentioned, was brought by parties who were owners of shore lands abutting upon Lake Washington, and riparian rights pertaining thereto, and the action was based upon the injury threatened to their property and rights by the material lowering of the water of that lake which was a necessary part of the public improvement. The defendants were the State, the County, and the contractor, and the object of the decree forbidding the further excavation of the canal was to prevent the lowering of the water to the detriment of plaintiff's property rights. There is nothing to show that the United States had acquired any rights as against these plaintiffs or other property owners of the same class, and any assumption by the War Department of responsibility for interfering with the natural level of the lake is inconsistent with the whole course of legislation to which reference has been made, and especially with the act of 1910. And this renders more

clear, what would probably be sufficiently plain from the language above quoted from the instrument, that the contract of August 16, 1910, between Captain Williams and Erickson was made not in behalf of the United States, but in behalf of the State of Washington. An engineer officer of the United States Army was probably selected to represent the State as a matter of convenience, in view of the fact that before acceptance of the finished work by the Government, the approval of the Secretary of War was a necessary prerequisite. But this did not in any wise enlarge the authority of Captain Williams with respect to the performance of the agreement. The act of Congress gave him no authority to act in behalf of the Federal Government with respect to the work of excavating the canal, or making a connection between it and Lake Washington which would necessarily lower the level of that lake. Hence it is a matter of no moment, for present purposes, whether the work for which plaintiff in error was held guilty of contempt of court, and which he claims was done under order of Captain Williams, was within or without the Erickson contract.

We are aware that the Supreme Court of the State of Washington, upon review of the decree in the *Bilger* suit, held that while the actual work of dredging the canal was done by the State and the County, it was done on behalf of the United States. It was for this reason, in part, that the decree awarding an injunction to restrain the further excavation of the canal was reversed. *Bilger v. State*, 63 Washington, 457, 467. So far as this view may have influenced the court in declaring the policy of the State, we have no concern with it. But we deem it clear that, under the acts of Congress, no agency for the Federal Government could arise with respect to anything done in the construction of the canal or the lowering of the level of Lake Washington. Neither the fact that the title to the right of way was vested in the United States, nor

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the presumed purpose that the Secretary of War should take charge of the work when finished, can override the evident policy of Congress that the canal should be accepted only when completed and ready for use, free of cost to the United States, and that the local interests should do the work of excavation and assume sole responsibility for lowering the level of the water.

Since we are of the opinion that Captain Williams derived no authority from the acts of Congress, it follows that the immunity here asserted with respect to acts done under his command is without legal support. And this renders it unnecessary to consider whether plaintiff in error, being subject to the restraint of the decree of the state court in the *Bilger* suit as an agent of Erickson, one of the parties thereto, could, without modification of that decree, have successfully claimed immunity for a violation of the restraint upon the plea that he acted under the authority of the Federal Government. Upon this question, therefore, we express no opinion.

Judgment affirmed.
